United States Court of Appeals

for the Second Circuit

APPENDIX

75-7131

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

JOHN A. GAVIN,

Plaintiff-Appellee,

vs.

TECHNICAL TAPE, INC., and TUCK INDUSTRIES, INC.,

Defendants-Appellants.

APPELLANTS' APPENDIX

Volume II, pp. 259a – End

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A I did not obtain this document from Carthage, Missouri.

Q And where did you obtain it from?

A I obtained it from the files of Technical Tape.

Q And when did you obtain it?

A This particular copy I obtained three weeks ago. The original copy I would have received in April 1973 when they were prepared. All financial statements were submitted to me for review before they were published.

Q You have a figure here $490,000 for Technical Tape and subsidiaries.

I ask you where did you get that figure from?

A By subtracting that from the total figure reported in the consolidation.

Q You had no record, no document, you have no document here today in which that $490,000 was obtained from?

A Yes, I do. The same kind of statement was prepared for Technical Tape. The numbers are slightly reclassified but they are identical.

Q These are the consolidated figures?

A Those are the consolidated figures.

Q Do you have any document for Technical Tape and subsidiaries unconsolidated?

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A No such thing as Technical Tape and subsidiaries unconsolidated.

Q You have no records --

THE COURT: Please don't yell. I can hear without you yelling.

Q There were no records with respect to Technical Tape and subsidiaries?

A The record is in this published annual report.

Q Did you take the figure 490,000 from the published annual report?

A I did.

Q Could you tell me where that figure appears?

A Technical Tape and subsidiaries appears in the annual report for 1972 right here.

Q Could you tell me where the figure $490,000 appears that you reported in your statement, Exhibit O for identification, as the income from Technical Tape and subsidiaries before unusual items; could you tell me where that appears in the annual report?

A It doesn't appear in the annual report.

Q It does not appear in the annual report?

A It does not.

Q Do you have any document with you today wherein that $490,000 figure appears?

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A No, I do not.

Q Would the same be true of every item, every figure listed under the heading "1972 Technical Tape and Subsidiaries"?

A That is correct.

Q Would the same be true of the figures under Technical Tape and subsidiaries for 1971 and 1973?

A Which colum are we talking about now?

Q Technical Tape and subsidiaries.

A That says "Technical Tape Subsidiaries."

Now, repeat the question.

Q Would your answer be the same with respect to 1971 and 1973 with respect to the column "Technical Tape and Tape Subsidiaires"?

A My answer would be the same with respect to all three years, 1971, 1972, 1973; namely, that the figures appearing in the column "Technical Tape and Tape Subsidiaries" repeat the consolidated figures minus the Steadley figures.

THE COURT: Is that correct, minus the Steadley figures, because on the Technical, Inc. annual report, 1972, and this is a copy, now what is the exhibit number?

MR. WOLOSKY: Exhibit 9, your Honor.

THE COURT: Show it to the witness, please.

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MR. WOLOSKY: The witness has a copy in front of him.

THE COURT: On the very first page under the legend "Financial Highlights" there are three columns, 1970, 1971 and 1973. And under 1970 there is a footnote 1 which states "Does not include Steadley, Inc. acquired in December 1970."

Wouldn't that follow that the Steadley income is included in 1971 and 1972?

THE WITNESS: Steadley income is included in the consolidated figures for 1971 and 1972 as set forth in this report.

Now, read the witness's last answer right ahead of this.

(Answer read.)

THE COURT: Isn't that inconsistent with what appears in this statement?

THE WITNESS: I don't believe you understand the response, your Honor. The response was that the figures appearing in the column on this work sheet to show the figures for Technical Tape and Tape Subsidiaries, which means Technical Tape and all subsidiaries excluding Steadley, the figure I have put in this column represents the figures published in the annual report, which includes everything,

minus the Steadley, come up with a net answer as to what the remaining companies did; namely, Technical Tape, Inc., Tuck Industries, Dominion Tape of Canada, and Technical Tape Limited of England, which were basically the company in tape and related products business.

THE COURT: Then you were referring to that exhibit that was prepared, and what you say, if I understand you now, you eliminated Steadley and Company and included all the tape subsidiaries?

THE WITNESS: Yes, your Honor.

THE COURT: Where did you get the figure from that you eliminated, that is what counsel is trying to get from you and it isn't clear to me. Where did you get that figure from?

THE WITNESS: I responded, your Honor, that there were statements prepared in the ordinary course of business and I took those figures from the files of Technical Tape to show the exact figures for Steadley which were used by the certified public accountants in preparing the consolidated numbers appearing in the annual report.

MR. WOLOSKY: Your Honor, may I inquire one or two more questions?

THE COURT: Yes.

MR. WOLOSKY: Your inquiry might become clearer?

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Q Mr. Degnan, these work sheets that you say you got your figures from for Steadley--

A I am sorry. Those are not the work sheets.

Q Are those statements prepared prior to the preparation of financial statements of the company?

A These statements are prepared after the auditors complete their audit of the two companies and reflect there on any adjustments recommended or made by the independent accountants.

THE COURT: One of the problems is you each speak of these statements without identifying what you are referring to. That is what cause me to ask the other questions.

Now, I don't know what you are referring to when you say "these statements". I believe the witness at one point referred to matters that were prepared in March 1973, I believe. And then there is another statement that was prepared two weeks ago.

Now please make it clear what you are referring to. Mark it as an exhibit for identification.

MR. WOLOSKY: May I have this marked as an exhibit for identification.

THE COURT: As far as an interoffice company set-up is concerned, do you have a separate breakdown for

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the income from each company, whether it is a tape company or the Steadley Company?

THE WITNESS: Yes.

THE COURT: As of a given period?

THE WITNESS: Yes. We have reparate income statements each month for each major segment of the total consolidated business. And each of these separate businesses are under the control of different accountants and different managers and they are used in measuring the results by division by management.

xx (Plaintiff's Exhibit 10 was marked for identification.)

Q I show you Plaintiff's Exhibit 10 marked for identification.

THE COURT: What is Plaintiff's Exhibit 10 first, so we have it clear in the record.

Q Tell us what exhibit 10 is.

A Exhibit 10 is a photocopy of the formal record of the results of operations of the Steadley Company, Inc., subsidiary of Technical Tape for the month of December, 1972, and the year ended '72, showing the actual results compared to the original budget for 1972.

THE COURT: What is the figure there that is shown there for the profits?

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THE WITNESS: Profits from Steadley is $883,000.

THE COURT: Didn't you give a figure before of some 400,000?

THE WITNESS: That is a figure before tax provision, your Honor. The tax provision is not reported in that particular document. The net income from Steadley on a comparable basis to the figure that I quoted before was $459,000.

MR. WOLOSKY: $490,000 is what the witness testified to was the income before unusual items for Technical Tape and Tape Subsidiaries, for which he testified he has no documentation here today.

Q Now, Mr. Degnan, you stated that the figure $883,000 was taken after the accountants finished their audit?

A Yes, I did.

Q Was it taken off a financial statement?

A It was taken off a consolidating financial statement which was prepared under the direction of the independent public accountants.

Q Was that an accountant's work sheet, consolidating work sheet?

A That would be the accountants consolidating work sheet. The numbers appearing on here are identical to the

numbers appearing on the accountants consolidating work sheets.

Q Now, did you check the accountants consolidating work sheet before you came here today?

A Yes, I did.

Q And were those in your possession, the work sheets?

A No. The original are in the possession of the certified public accountants. A copy of them are in the possession of the present chief financial officer of Technical Tape.

Q Now, you don't have the accountants work sheets here today and you don't have the books and records here today; is that correct?

A I have the copy of that which is a copy of the books and records.

Q Which is a summary of what is contained in the work sheets? It is a figure taken off another document?

A No, it is a figure that ties into the general ledger of the company.

Q That is right. The general ledger and the general journal are books and records of the company. Are figures taken off those to prepare financial statements?

A Yes. Those numbers there appear in the financial

records.

Q Could you please answer my question?

A Yes.

Q You say that these numbers appear in the general journal and general ledger of the company.

A Yes.

Q Do the accountants take those figures off the general journal and general ledger and prepare work sheets?

A Yes.

Q And after they prepare the work sheets do they prepare trial balances?

A Yes.

Q And after they prepare the trial balances, do they prepare consolidating work sheets and financial statements?

A Yes.

Q And then they get a figure, and then do they make adjustments?

A They usually make the adjustments first.

Q Are adjustments made?

A Yes.

Q And then they get a figure?

A Yes.

Q A figure such as $883,000?

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A Yes.

Q And that figure is a summary of everything that's gone before?

A Yes.

MR. WOLOSKY: I am going to object to the introduction of this document on the grounds there are no records to support the figures on the doucment for Technical Tape and Subsidiaries on the grounds that the other figures on the document, by the witness' own testimony, appear to be a summary of the books and records of the company which are not in evidence. By introducing this document it is sought to circumvent the business records rule through hearsay testimony of the witness.

THE COURT: Is there any book, record or document that the defendant, Technical Tape, Inc. has which would reflect the separate net income of each of the companies, that would include Technical Tape, Inc., the other tape companies and the Steadley Company?

THE WITNESS: Yes, your Honor.

THE COURT: What is that book? How would you describe it?

THE WITNESS: It is a monthly book that is put out showing the income from each of the companies. It shows the results for the month compared to the budget each

A Yes.

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month, and the cumulative figures, actual versus budget each month.

In addition to that the book contains the details of all the significant financial data underlying the base financial statement.

THE COURT: I would require the production of that original book before I admit this in evidence.

Let me ask you one further question, Mr. Degnan:

Turning to this Technical Tape, Inc. annual report of 1972, again on that first page it reflects a net income in that year of $1,565,183.

THE WITNESS: Yes,your Honor.

THE COURT: I take it that is a total of various companies?

THE WITNESS: Yes, your Honor.

THE COURT: Which of the companies income is reflected in that total?

THE WITNESS: Yes, your Honor.

THE COURT: Which are the companies?

THE WITNESS: Technical Tape, Tuck Industires, Dominion of Canada, Technical Tape Limited of England and the Steadley Company, Inc.

THE COURT: Now, I am coming back to the question I asked you before. There must be some record reflecting

the respective sums of net income of each of these companies in order to reach that total.

THE WITNESS: Yes, there is, your Honor.

THE COURT: Is that contained in what we just referred to?

THE WITNESS: Yes, your Honor.

THE COURT: I will require the production of the book.

MR. PANISH: I have a short further inquiry, your Honor.

THE COURT: Yes.

DIRECT EXAMINATION (Continued)

BY MR. PANISH:

Q Didyou prepare from that original book of entry the paper you referred to, Plaintiff's Exhibit 10 for identification?

A I did not prepare No. 10.

Q That is the paper you used partially for the preparation of your report?

THE COURT: What are you referring to now?

THE WITNESS: Exhibit 10, your Honor, which is the Steadley income for 1972, is a copy of the piece of paper that appears in the book we just referred to.

Q Is that paper you are holding up, Plaintiff's 10

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for identification, kept in the regular course of business of the defendant?

A Yes, it is.

Q And is it the regular course of business to keep such an entry?

A Yes.

MR. PANISH: I offer it in evidence, your Honor.

MR. WOLOSKY: Your Honor, I object. By the witness' own testimony just a few minutes ago he testified that everything he has here is a summary of the books and records of the company.

THE COURT: I said I still will require the production but I will receive it on the basis of the witness' testimony, that this is a record kept in the usual and regular course of business. I take it that it is issued monthly?

THE WITNESS: Yes.

THE COURT: Then there are cumulative totals on there?

THE WITNESS: Yes.

THE COURT: That is how you get to the total at the end of the year?

THE WITNESS: Yes.

THE COURT: Is distribution of that exhibit made

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to various offices of the company?

THE WITNESS: Distribution of that is made to all senior management officers of the company.

xx (Plaintiff's Exhibit 10 was received in evidence.)

Q After having used Plaintiff's Exhibit 10 in evidence, Mr.Degnan, did you then obtain what the exclusion is in respect to the Steadley income regarding the 1972 fiscal, net income from operations from Technical and Tuck Industries; didyou make that exclusion?

THE COURT: I think I know what you have in mind. Take this figure again of $1,565,183. You have indicated that is made up of the component parts of the net income of the different companies that you named, including the Steadley Company.

THE WITNESS: Yes, your Honor.

THE COURT: What amount was ascribed to net income of the Steadley Company that was included in the $1,565,183?

THE WITNESS: $883,000, your Honor.

Q Now --

THE COURT: Give that to me again.

THE WITNESS: $883,000.

THE COURT: Is that an even amount?

THE WITNESS: Your Honor, I took all the numbers and rounded them off. I don't think the numbers after that are significant. I started with $1,565 and subtracted 883 for Steadley.

Q And what did you obtain?

A Obtained a net of 682,000 for Technical Tape and its tape subsidiaries for 1972.

Q Now, was it necessary or did you also exclude any extraordinary items in respect to that fiscal period?

A For the numbers that I just quoted I did not exclude the extraordinary items.

Q Now, taking that figure, did you compare that with the fiscal net income for 1971?

A I did.

Q Now, in the annual report of 1971, which is Plaintiff's Exhibit 8 in evidence, on page 11, sets forth a figure of net income of $1,209,125. Can you tell us what companies that figure includes?

A That figure includes the same companies in '71 as the figures for '72.

Q Did you then make an exclusion in respect to that figure regarding the Steadley net income for that fiscal period, namely, 1971?

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A A portion of that income which was earned from the Steadley operation was $309,000.

MR. WOLOSKY: Objection, your Honor. The witness is reading from the exhibit.

THE COURT: What is wrong with that? It is an exhibit in evidence.

MR. WOLOSKY: That is not an exhibit in evidence.

THE WITNESS: Yes, it is.

THE COURT: I thought he was reading from an exhibit.

MR. WOLOSKY: He is reading from this spread sheet which he prepared which is not in evidence.

MR. PANISH: I offered it in evidence, your Honor. I don't know whether it was marked or not. I offered this before in evidence.

MR. WOLOSKY: I believe your Honor ruled that you would require --

THE COURT: I admitted a document just a moment ago.

MR. WOLOSKY: It is right beofre you, your Honor.

THE COURT: Don't you have a similar document for the month of December 1971?

THE WITNESS: Yes, your Honor.

THE COURT: Why don't you produce that? That would have the figure.

Q Is this paper you just handed me kept in the regular course of business;

A Yes.

Q Of the defendant?

A Yes.

Q And is it the regular course of business to keep such a record?

A Yes.

Q Does this reflect the income of the Steadley Company for the month of December 1971 as well as the final figure for that fiscal period ending December 1971?

A That figure overstates the income of Steadley by $90,000. I found in checking the numbers that there was an adjustment that reduced the Steadley income to $309,000, and a formal adjustment was not carried forward.

THE COURT: When did you make the adjustment?

THE WITNESS: It was made by the accountants in 1971.

Q Subsequent to the preparation of this? After this was prepared?

A Yes; this was the pre-audit figure. The post-audit figures were never published.

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Q Did you then use the adjusted figure?

A Used the adjusted figure which was only 209.

MR. PANISH: I offer it in evidence, your Honor.

MR. WOLOSKY: Your Honor, I am going to object to these documents because the witness testified that the figures shown on the document are not correct. He said there were adjustments made. We don't have the benefit of knowing what those adjustments were.

THE COURT: I must say that this is not as clear as it might be. I would like to go back to this thing.

Take that exhibit in front of you. You have now deducted $883,000 from the $1,565,183; is that correct?

THE WITNESS: Yes, your Honor.

THE COURT: Now, what is the breakdown of the other companies that went to make up the total of the $1,565,183? In other words, what is the Tuck Industries net income for the year '72?

THE WITNESS: Tuck by itself? I don't have that number.

THE COURT: What is the Dominion Tape of Canada Limited?

THE WITNESS: My recollection, your Honor, and

I don't have the numbers with me, was that the Tuck U.S. figure for 1972 was about $200,000 --

THE COURT: We can't go by abouts. There are precise definite figures as to net income of the year '72 as against the year '71.

Now, my question is very direct to you: What is the net income attributable to each of the companies that went to make up the total of the $1,565,183? You have already give me one figure, $883,000 for the Steadley Company. Now I want to know the breakdown of the four other companies that went to make that total.

THE WITNESS: I do not have those figures with me.

THE COURT: I will not accept this as evidence. You have the figure right in your exhibit that was offered here. It is your financial statement.

MR. PANISH: We are giving the plaintiff the benefit of all the other four companies.

THE COURT: You are not giving him the benefit of anything. It is a question of whether or not he is entitled to something. Now, there are these two figures here. The plaintiff claims he is entitled to the differential between the net earnings of 1971, shown on this document at $1,291,125, and the amount of net earnings in 1972

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of $1,565,183, and I think --

MR. PANISH: We say, your Honor --

THE COURT: Now wait. Now this company has apparently undertaken to exclude, under the resolution, the earnings of the Steadley Company for 1972. This witness has testified it was $883,000.

Is that correct?

THE WITNESS: Yes.

THE COURT: I am asking for the differential between the breakdown of 883,000 and the $1,565,000. There are four other companies whose income was included there. I want the figures of the four other companies. Otherwise this testimony has no meaning at all, no probative value of any kind.

Now, put your next question.

Q Was it necessary for you, Mr. Degnan, to obtain a breakdown of Technical Limited, Technical Tape, Dominion and Tuck Industries in order to arrive at the net income, aside from the Steadley net income?

MR. WOLOSKY: Objection, your Honor.

THE COURT: Objection sustained. It is a very simple set-up. He has testified -- I think there are five companies, that it was the net income of five companies that went into that 1972 figure of $1,565,000. There is an

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exclusion now of some $883,000. I want to see the net income attributed to the other four companies.

We will take our mid morning recess.

(Recess.)

(In open court.)

MR. PANISH: Your Honor, I call for the production of the breakdown, in line with what your Honor stated before the recess, and in view of that I would like to respectfully remove this witness temporarily. The records are on their way down and I have another witness in the witness room which I would call.

THE COURT: Very well.

MR. PANISH: You may step down, Mr. Degnan.

(Witness excused.)

MR. PANISH: Your Honor, is it appropriate for me at this time to have the chairman of the board present in the courtroom in that since the defendants are corporations and they don't appear in person and ordinarily a party has a right to remain while testimony is taken, I ask that one witness be --

THE COURT: No, I will exclude all witnesses because part of this case is a fact determination I believe involving all the witnesses who are present. I think it would be more desirable if all witnesses be excluded

when a witness is testifying.

MR. PANISH: Have Mr. Katz come out, please.

M E Y E R K A T Z, called as a witness on behalf of the defendants, after having been duly sworn, testified as follows:

MR. WOLOSKY: Your Honor, may I ask when the records of the company arrived here that I be given an opportunity to look at them?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. PANISH:

Q Where do you reside?

A 21 Dutch Geln Drive, Bardonia, New York.

Q And what is your occupation?

A I am an accountant.

Q Are you associated with a Mr. Hyman Ketchel?

A I am an employee of the firm of Hyman Ketchel.

Q Is Mr. Ketchel a certified public accountant?

A Yes, he is, sir.

Q Is he also an attorney?

A Yes.

Q Does he have his office at 853 Broadway, New York City?

A Yes, sir.

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Q Is that where you are employed?

A Yes, sir.

Q And are you aware of the fact that a subpoena duces tecum was served upon your office in connection with this case?

A Yes, sir.

Q And pursuant to that subpoena did you produce certain books, papers and records?

A Yes, sir.

Q Will you produce the record sent to you by Mr. Gavin which you were good enough to show me a few minutes ago, the one he sent to you which had certain items in reference to expenses. That is the one I am referring to.

A Which record are you referring to?

Q If I may, this one, sir (indicating).

Now, I show you these documents which have an address on top 407 Beacon Boulevard, Sea Girt, New Jersey, and ask you where that was obtained from.

A I don't know, sir. It is in the file. I have no knowledge of what the file contained. I took the file from the offices and whatever I have in the file is what was found in the office. I have no personal knowledge of any of the documents in this file.

Q Is it proper for your office to keep a file for each client?

A Yes.

Q Each accountant client?

A Yes.

Q Is there such a file for Mr. Gavin?

A Yes.

Q You obtained this paper from that file?

A Yes, sir.

Q Are you aware of the fact that Mr. Gavin does reside at the address I just stated?

A I do not know because I didn't handle Mr. Gavin's account and I don't know Mr. Gavin personally. As I stated, I took the file as it appeared in the office.

Q Also in the upper left-hand side it has a name here Gavin, J.A., do you see that, sir?

A Yes.

Q This is taken from his file?

A Yes.

Q Is it in the regular course of your business to keep records of clients in files as you just mentioned?

A Yes.

Q And is this one of the records you kept in the course of your business?

A Yes.

MR. PANISH: I offer this in evidence.

MR. WOLOSKY: No objection, your Honor.

XX (Defendants' Exhibit P was received in evidence.)

(Pause.)

THE COURT: All right.

Q Now, in respect to Defendants' Exhibit P in evidence it contains some itemization regarding personal expenses. Do you see that, sir?

A Yes, sir.

Q And do you know whether or not those personal expenses were then deducted on behalf of the plaintiff in respect to his 1973 federal income tax return?

A I don't really know but I believe so because I see that the person in the office who prepared the return made checkmarks in pencil indicating that these items were picked up. I assume that they were included in the tax return for computation.

Q Do you know who prepared his 1973 --

MR. WOLOSKY: I would move to strike the witness' testimony insofar as it is based on an assumption and not his personal knowledge.

THE COURT: I am aware of the fact that he said

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he assumes.

Q Do you know who prepared the plaintiff's 1973 federal income tax return?

A Yes, sir.

Q Who did?

A Jerome Gettelshon.

Q Is he an employee of the firm?

A Yes, sir.

Q How many employees does Mr. Ketchel have?

A Six employees.

Q Does Mr. Ketchel prepare any returns?

A No, sir.

Q Do you know why Mr. Ketchel didn't appear pursuant to this subpoena?

MR. WOLOSKY: Objection, your Honor.

THE COURT: Objection sustained.

A There is also a notation on this exhibit in the same letter, Defendants' Exhibit P, in the upper left-hand side, which I refer you to. Will you be good enough to read that short phrase, please.

A "Left compnay TT on April 10, 1973."

Q Do you understand that TT stands for Technical Tape?

A If you tell me, sir, because I didn't handle the

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account. I don't know anything about the names involved, and so on.

Q Are you aware of the fact that the plaintiff was working for Technical Tape at the beginning of 1973?

A No, sir. I have no knowledge of the defendant or the plaintiff. I have no knowledge of the file. I have no knowledge of the tax returns. I have never met Mr. Gavin, never spoke to Mr. Gavin. I have no knowledge whatsoever.

Q Did you speak to his attorneys?

A No, sir, never spoke to his attorneys.

Q Do you know whether Mr. Ketchel did?

A He never spoke to them either.

Q Mr. Ketchel never spoke to them?

A Never spoke to them.

Q Who from your firm handled the Gavin account?

A Well, I think that Mr. Louis Bernstein may have handled the account.

Q Is he a public accountant?

A No, sir.

Q He is not?

A No, sir.

Q What is he?

A He is an employee of the firm.

A To my knowledge they were the only ones.

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Q And do you see him from day to day?

A Yes, sir.

Q Is he still employed by Mr. Ketchel?

A Yes, sir.

A Is he aware of the fact that a subpoena was served in this case?

MR. WOLOSKY: I object.

THE COURT: Objection overruled.

A Is he aware of the fact? Yes, sir.

Q Now, the file that you produced in court now pursuant to the subpoena that was served, do you have any correspondence indicating that certain papers were sent to the plaintiff's attorneys, Parker, Chapin & Flattau?

A Yes, sir.

Q Will you produce that, please.

A These are copies of what we call memorandums.

Q I show you this one dated October 4, 1974 and ask you if that is the copy of the original that your office kept?

A Yes, sir.

Q That was sent by your office to Mr. Alter?

A Yes, Parker, Chapin & Flattau.

Q Is it the regular course of your business to keep copies of such correspondence?

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A Yes.

MR. PANISH: I offer it in evidence, your Honor.

MR. WOLOSKY: Your Honor, I object. There is no dispute that we got documents and we got them particularly to show to Mr. Panish. I fail to see the relevancy of all this.

THE COURT: What is its relevancy?

MR. PANISH: When I made a discovery and inspection in this case the plaintiff did not produce all the quarterly in Jersey sales tax returns concerning the plaintiffs new business, Encore Tape & Label.

MR. ALTER: I represent to this Court that all documents received by counsel from the attorney were exhibited to Mr. Panish on pretrial discovery.

THE COURT: You mean from the accountants.

MR. ALTER: All documents received from the accountants were exhibited to Mr. Panish on pretrial discovery in this action.

THE COURT: We are just really spending time on matters that are so inconsequential in terms of the issues in this case.

Receive it in evidence. I think Mr. Panish will be happier if we receive it.

(Defendants' Exhibit Q was received in

xx

evidence.)

THE COURT: I don't understand why the lawyers disregard the pleadings in the case, the issues in the case and why we are getting off on all these by-paths.

MR. WOLOSKY: Mr. Panish has another letter to our firm. I don't object to its receipt. In accordance with your ruling just now I would concede that it be accepted.

xx (Defendants' Exhibit R was received in evidence.)

THE COURT: Mr. Alter, you say you made all the documents referred to in these exhibits available to defendants' attorney?

MR. ALTER: To the best of my knowledge I did.

MR. PANZER: Your Honor, I state for the record that all the quarterly returns were not shown to me. I have an itemized list of just what was shown to me.

THE COURT: Please address a question to the witness.

Q Mr. Katz, do you have any financial records pertaining to this plaintiff in your present file?

A You have to be more specific, sir. When you say financial records, what do you mean by that? I have a whole file here.

Q You are an accountant?

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A Yes.

Q Are you, sir?

A Yes.

Q Are you a CPA?

A No, I am a public accountant.

Q Public accountant?

A Yes.

Q You know what I mean by financial statements. Do you have any tax returns, balance sheets, P and L statements, trial balances.

A I have a 1972 federal and state tax return.

Q May I see that, sir, for a moment?

A Yes, sir.

Q Do you also have in your possession a 1973 non-resident New York State income tax return?

A No, sir.

Q Well, you produced a copy of a 1972 non-resident New York State income tax return.

A Yes, sir.

Q Do you know whether or not your office prepared a 1973 New York State non-resident income tax return for this plainiff, Mr. Gavin?

A If I could see that memorandum, what we mailed to that firm, please.

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Q Yes.

MR. WOLOSKY: Your Honor, the non-resident income tax return for 1973 is part of Exhibit H for identification. It is in evidence rather, your Honor, along with his federal return.

MR. PANISH: May I see that, please?

MR. WOLOSKY: Yes (handing).

Q Now, I show you Defendant's Exhibit H in evidence, the 1973 federal return. Are there any capital losses reported with respect to the plaintiff's business, Encore Tape & Label?

A Capital losses?

Q Yes.

A No, sir.

MR. PANISH: I have no further questions.

CROSS EXAMINATION

BY MR. WOLOSKY:

Q Mr. Katz, you didn't prepare Mr. Gavin's 1973 tax returns?

A No.

Q You have no knowledge of whwat was deducted, what expenses were deducted?

A No, sir.

Q I show you a page from Exhibit H, which is

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Exhibit H, whic is Mr. Gavin's tax return entitled "Profit or Loss from Business or Profession." I ask you whether Mr. Gavin reported a $14,000 loss from the operations of Encore Tape and Label in the year 1973?

A Yes, sir.

Q When would a capital loss be taken?

A Well, capital loss --

MR. PANISH: He testified there was no capital loss.

MR. WOLOSKY: That is right. I am attempting to establish there was.

MR. PANISH: Is he recanting his testimony? That was pursuant to my examination.

Q Could you answer thequestion?

A When is a capital loss to be taken?

Q Yes.

MR. PANISH: I object on the grounds it is too general, your Honor.

THE COURT: Overruled.

A A capital loss is taken generally when -- assuming when a business starts you make a capital investment and when you go out of business or when the business is terminated or at the time when the business is terminated you take a capital loss or gain.

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Q If a business was not terminated until 1974 you wouldn't take a capital loss in 1973, would you?

A That is correct, sir.

MR. WOLOSKY: No further questions.

REDIRECT EXAMINATION

BY MR. PANISH:

Q Was there a capital loss taken on this 1973 federal return?

A No, sir.

Q Was the business terminated in that year, as far as you know?

A It was not terminated. It doesn't indicate a final return.

Q Well, this was a single proprietorship; isn't that so?

A Yes, sir.

Q What do you mean by a final return?

A Well, I have in the file here, I have his first quarterly tax payment, first quarter of 1974. According to the file he was in business during the first quarrter of 1974. I have a payroll tax for the first tax quarter of '74 and a sales tax for the first quarter.

Q Do you have one for the second quarter?

A No, sir.

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Q Do you know whether he filed one for the second quarter?

MR. WOLOSKY: I object, your Honor. This is irreelvant.

A Yes, sir. There was a return filed -- let me see.

Q What sales did the plaintiff have from April 1st to April 5th, 1974? Do your records indicate that?

A Yes, sir.

Q How much?

A $3,164.

MR. PANISH: I have no further questions.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Call your next witness.

MR. PANISH: Mr. Herman Sprayregen.

H E R M A N S P R A Y R E G E N, called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PANISH:

Q Mr. Sprayregen, where do you live?

A 239 Central Park West.

Q Are you connected with the defendants in this

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case, Tuck Industries and Technical Tape?

A I am.

Q Are you a member of the Board of Directors of the defendant, Technical Tape?

A I am a member of the board.

Q Are you presently employed by Tuck Industries?

A Yes, I am.

Q What is your position, sir?

A Well, I am the purchasing agent and real estate department.

Q And did that commence in May of 1974?

A Pardon me?

Q Did that begin in May of 1974?

A Yes, I started May 1, 1974.

Q And have you been a member of the board of directors from August 1972?

A I was.

Q And from August 1972 to the present date have you been in attendance at various board of directors meetings of the defendant?

A I was.

Q Did there come a time when you met the plaintiff in this case, Mr. Gavin?

A I didn't quite hear the question.

Q I say did there come a time when you met the plaintiff, Mr.Gavin, in this case? Did you meet him at any time?

A I did, at the offices of Technical Tape.

Q Did you meet him when he became president of the company in April of 1972?

A Yes.

Q Now, I am going to bring you down to the beginning of April 1973. Do you recall that there was some type of dispute with respect to Mr. Don Moran and Mr. Gavin; do you recall that?

A I sure do remember.

Q During the first week in April of 1973, on April 6th, was a board of directors meeting held?

A At our office at the Pan Am building.

Q And were you in attendance at that board of directors meeting?

A Yes, sir.

Q And were there also other board of directors present?

A Yes, sir.

Q And was a quorum present at that time?

A There was a quorum.

MR. WOLOSKY: Objection. I am going to object

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to that, your Honor. He is purporting to summarize the bylaws of the company.

THE COURT: How many persons were present?

THE WITNESS: At the meeting?

THE COURT: Yes.

THE WITNESS: There were, I believe, five of us.

THE COURT: Who were the persons present?

THE WITNESS: Joe Sprayregen, my son; Howard Weitz, the attorney and a member of the board; myself; Dick Bernard; and John Gavin.

Q Now, do you recall about what time that board meeting started?

A Early in the morning, about 8:30.

Q Now, at the opening of the meeting did your son, Gerald, make a statement to the members of the board that were present in connection with the business that would come before the meeting?

MR. WOLOSKY: I object to the form of the question, your Honor. I ask that the witness -- that counsel ask merely who said what at the meeting and not attempt to lead the witness.

THE COURT: He is not leading the witness. I will allow it.

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A Gerald Sprayregen at the beginning of the meeting, the purpose of that meeting was that John Gavin gave him an ultimatum --

MR. WOLOSKY: Objection, your Honor. Can he limit himself to what was said.

THE COURT: Is this what he said?

THE WITNESS: That is right.

THE COURT: State as best you can what was said by the persons present, starting first with --

THE WITNESS: Well, Gerald Sprayregen stated at the meeting that John Gavin gave him an ultimatum a couple of days before that he fire Don Moran, who is in the marketing business, and if he didn't fire Don Moran he will resign from any connection with Technical Tape, as president or any other capacity that he is holding at that time.

THE COURT: What else was said then? Did Mr. Gavin say anything?

THE WITNESS: Mr. Gavin said immediately that he did not give that ultimatum.

THE COURT: What else did he say?

THE WITNESS: Nothing.

THE COURT: What else did your son say?

THE WITNESS: They started to scream, John and Gerald, at each other. Each one said that you did and

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you didn't. After they quieted down -- can I proceed?

THE COURT: Yes.

THE WITNESS: I asked John Gavin, I says, "John Gavin, did you or didn't you give that ultimatum to Gerlad"? He says "No, I did not."

I repeated this a couple of times. I says, "John, is Geraldtelling a lie or are you telling the truth?"

Well, after probably three times or four times, after I asked him the question, he said, "I did give Gerald that ultimatum." What connection did Don Moran have with the company?

A In the marketing department.

THE COURT: Did any of the other persons who were present say anything?

THE WITNESS: I was the one who questioned John. The others didn't, They were just there sitting.

THE COURT: They didn't say anything, the others?

THE WITNESS:Not that I remember.

THE COURT: All right, go ahead.

Q Now, was Gerald the chairman at this meeting?

A Gerald was chairman of that meeting.

Q Was Howard Weitz, the attorney, the secretary who was taking minutes of that meeting?

A Absolutely.

A Took place in Mr. Gavin's office.

Q Did he take minutes of meetings before this?

A He did.

Q Now, did there come a time when a vote was taken in respect to Mr. Don Moran?

A Right after when John Gavin said "I did," I made a motion that we should keep Don Moran as our marketing man and not fire him.

Q In respect to that what was the vote?

A And everyone except John Gavin voted in favor of keeping Don Moran.

Q Was a recess then taken?

A Then it was recessed, they recessed until the afternoon.

Q Do you know what happened during the recess period?

A Gerald Sprayregan and John Gavin, he spoke -- they went into a separate room and they discussed whatever it was for quite a while, until about 3 p.m. that same afternoon.

Q Were they there for several hours as far as you know?

A At least several hours.

Q And were they the only two in the room to your knowledge?

A To my knowledge they were the only ones.

Q Now, did there come a time when the board reconvened or met again about 3 o'clock that afternoon?

A Yes, sir.

Q And when the meeting started up again was Mr. Gavin present?

A No, he was not.

Q Were the other board members present, the ones you mentioned, with the exception of Mr. Gavin?

A That is right, the rest of the board members were there.

Q Did that constitute a quorum?

A Right.

MR. WOLOSKY: I object, your Honor.

THE COURT: Who was there at the time?

THE WITNESS: Gerald Sprayregen, myself, Dick Bernard and the attorney, Howard Weitz.

THE COURT: Was he a director?

THE WITNESS: He is a director.

Q Did a discussion then take place among the board members?

A I made a motion right there that we should --

MR. WOLOSKY: Your Honor, I object to any conversations had in the absence of the plaintiff.

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THE COURT: Well, you will have to rely there on the minutes, if you have them. Objection sustained.

Q I show you these written minutes of the April 6, 1973 meeting. Have you seen them before you came to court today?

A Pardon me?

Q Have you seen these minutes before you came to court today?

A Yes.

Q Are these minutes kept in the regular course of business of the defendant?

A Pardon me?

Q Are these minutes kept in the regular course of business of the defendant, Technical and Tuck?

A Yes.

MR. PANISH: I offer them in evidence.

MR. WOLOSKY: May I inquire, your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. WOLOSKY:

Q Mr. Sprayregen, do you know who prepared these minutes?

A Howard Weitz.

Q Do you know when he prepared them?

A I couldn't tell you when he prepared them.

MR. WOLOSKY: Your Honor, I am going to object to them.

THE COURT: There is no question they are the minutes, is there? When they were prepared will simply go to the weight to be given to them under the rule.

MR. WOLOSKY: There is no question, your Honor --

THE COURT: These are the corporate minutes, are they not?

MR. WOLOSKY: I don't question that.

THE COURT: All right. The weight to be given to them, the circumstances under which they were made is another matter.

(Defendants' Exhibit S was received in evidence.)

MR. WOLOSKY: I would like to point out that the bulk of the minutes -- that the minutes themselves are self-serving declarations.

THE COURT: Don't you think the Court can figure that out for itself?

MR. WOLOSKY: I am just doing that job.

THE COURT: The fact the minutes state there was a resignation doesn't prove the fact. It is one of the facts to be established.

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Q Mr. Sprayregen, did you also attend the meeting --

THE COURT: You had no written resignation from Mr. Gavin at the time of this meeting,did you?

THE WITNESS: Not that I know of.

THE COURT: Nobody asked him for a written resignation?

THE WITNESS: No. I don't remember that coming up.

THE COURT: Was there any discussion about severance pay to him?

THE WITNESS: Not at all.

THE COURT: Go ahead.

Q Did you subsequently attend a board meeting of the defendant on April 24, 1973?

A I did.

Q And were you one of the directors that was present at that meeting?

A Yes.

Q Now, during that meeting, were the April 6, 1973 minutes, which were just marked Defendants' Exhbiit S in evidence, were they read and approved bh the board members that were then present?

MR. WOLOSKY: I am going to object.

THE COURT: What does that prove as far as

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this case is concerned? They approved their own action in the absence of the plaintiff? They simply say they were right in what they did?

MR. PANISH: It is usual and customary for the corporation to read the prior minutes.

THE COURT: Suppose they did approve the prior minutes, it doesn't approve that the alleged conduct which the plaintiff contends --

MR. PANISH: That is another matter. This is part of the corporate minutes showing these minutes were prepared and approved.

THE COURT: Received as part of theminutes of the company.

xx (Defendants' Exhibit T was received in evidence.)

THE COURT: Do you have any other questions of this witness, Mr. Panish?

MR. PANISH: No further questions of this witness.

THE WITNESS: Excuse me, counsel, I want to ask you a question.

MR. PANISH: I don't think you have to ask me anything.

THE COURT: Wait until counsel asks you questions.

MR. PANISH: Go ahead, sir.

THE WITNESS: Can I ask?

MR. PANISH: It is up to the Court.

THE WITNESS: I don't know whether you asked me about a vote on John Gavin's resignation.

Q Was a vote taken?

A Yes.

Q What was the vote?

A All unanimous for the acceptance of the resignation.

THE COURT: I asked you a question before, you had no written resignation from him?

THE WITNESS: No.

MR. PANISH: I have nothing else.

CROSS EXAMINATION

BY MR. WOLOSKY:

Q I show you the minutes of the April 6th meeting which is Defendants' Exhibit S in evidence and I ask you to look at page 2 of those minutes and the resolution accepting the resignation of Mr. Gavin.

A Yes, sir.

Q Now, that resolution was passed after Mr. Gavin left the meeting, wasn't it?

A Yes, sir.

Q Have you given us, to the best of your knowledge,

the conversations that took place at the April 6th meeting while Mr. Gavin was present?

A I don't quite get what you say.

Q Well, I am asking you when Mr. Panish asked you on your direction examination what was said at the meeting while Mr. Gavin was present, you have nothing to add to that now?

A Not that I could remember anything different.

Q That is all that was said while he was present?

A Yes, sir.

MR. WOLOSKY: I have no further questions of the witness.

MR. PANISH: No questions.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Call the next witness.

MR. PANISH: Mr. Gerald Spraygen.

G E R A L D S P R AY G E N, called as a witness on behalf of the defendants, after being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PANISH:

MR. WOLOSKY: May we have Mr. Spraygen, Sr. excused?

THE COURT: He is not going to be called again.

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MR. PANISH: I am not going to call him again.

MR. WOLOSKY: All right.

THE COURT: As long as his testimony is completed he may remain.

Q Mr. Sprayregen, are you connected with the defendants?

A Yes.

Q Are you a stockholder?

A Yes.

Q Were you made chairman of the board of directors and the chief operating officer of the defendant Technical Tape at a board meeting on April 4, 1972?

MR. WOLOSKY: I thinkhe is referring to chief executive officer.

Q Chief executive officer, yes.

A Yes.

Q Were you also made a member of the executive committee of the company on April 30th of 1971?

A Yes, sir.

Q And what are your duties in connection with any company?

A Presently?

Q Yes.

A I am chairman of the board and chief executive

officer.

Q And were you actively engaged in these companies in 1972 and 1973, 1971?

A Not as actively engaged as I am now.

Q And did there come a time at the beginning of 1971 that you interviewed Mr. John Gavin in respect to his prospective position?

A Yes, sir.

Q Did he state his qualifications to you at that time?

A I believe so.

Q Was anything mentioned in respect to him having authority to hire and discharge employees?

A The title that we were discussing it would be an apparent authority. It wouldn't have to be discussed.

Q And how many subsidiary companies made up the defendant Technical Tape, Incorporated?

A Well, you had Tuck Industries and you had the Canadian subsidiary and the English subsidiary and the Steadley group. It was basically divided in between springs and tape.

Q And primarily what were Mr. Gavin's duty or duties in connection with these companies? In other words, which subsidiaries did he cover?

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A His title covered them all. We specifically only spoke about him having anything to do with the tape operations. He was basically a tape man. The president of the spring companies was a very qualified man who had done an excellent job and it was specifically requested that Mr. Gavin only attend to the three subsidiaries in the tape field.

Q And to your knowledge did Mr. Gavin have any experience in relation to bed springs, its manufacturing or marketing?

A It wasn't a question because he had nothing to do with it.

Q And to your knowledge was he employed by other tape companies prior to April of 1971?

A Yes.

Q And I believe way back around 1959 down where he was employed by Tuck Industries for a period of time?

A I don't know if it was Tuck Industries but he was employed employed by a subsidiary of Technical Tape for a short period of time, yes, sir.

Q That also related to pressure sensitive tape?

A The selling of it, yes.

Q Is that, as far as you know, the same thing he did in Mystic Tape?

A To the best of my knowledge, yes.

Q Now, did there come a time when Mr. Gavin had a conversation with you at the end of 1972 in relation to Mr. Don Moran?

A I am not sure about the date. I know we had a conversation prior to our April meeting, but if I had to put a date on it I would suggest it was probably some time in early 1973 rather than 1972. The reason I would state that is because I believe Mr. Gavin, Mr. Moran and myself took a trip to Europe and I believe that was in the end of 1971.

At that time they were very friendly and there was a very good accord between the two of them. So I wouldn't think it would be in December because that would be too close to the time they were still very friendly.

So I would put the conversation that we had when John first told me he was unhappy with Don Moran, some time, I believe, in '72 -- '73, '73.

Q You took a trip at the end of what year, '72?

THE COURT: He said '71. Do you mean '72?

THE WITNESS: I believe it was '72, yes, your Honor.

Q Now, tell us briefly what were the duties of Mr. Don Moran in connection with the defendant?

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A Well, he was a marketing vice president and he headed up -- he was responsible for the overall marketing efforts of the tape division.

In other words, he was responsible for our electrical division, our consumer division, our industrial division and he reported frequently to Mr. John Gavin.

Q In respect to this conversation that Mr. Gavin had with you which you place at the beginning of 1973, tell us what you said to Mr. Gavin and what he said to you concerning Mr. Don Moran.

A Let me start off by saying I have a very vague recollection of it. I think it was simply that John told me that he had become disenchanted with Mr. Moran and he felt thathe would like to let him go. At that time I specifically told him that I would prefer, strongly prefer that he was not let go. And then when John perhaps came a little stronger in his desires, I specifically give him a direct order that he could not fire Moran unless I gave him permission.

Q And did he abide by your instruction not to fire him?

A Well, he never fired him.

Q I see. Now, did Mr. Gavin have any further conversations with you about Mr. Don Moran?

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A I believe the next conversation we had was some time in early April when Mr. Gavin called me in my New York office, the first time he had ever done that, and requested that I come out to see him. He had never -- before any time he wanted to see me he came to see me. This was the first time he called me up and asked me to come out to Technical Tape, it was very important and he wanted to see me that very day.

Q Now, as a result of that telephone call did you go to the New Rochelle office?

A Yes, I did.

Q And do you recall whether that was on April 2nd or 3rd of '72?

A I'm not sure.

Q Either one of those two days?

A Probably either a Monday or a Tuesday.

Q Did you then arrive at the New Rochelle office?

A Yes.

Q Did you then have a conversation with the plaintiff?

A Yes, I did.

Q Was that in relation to Mr. Don Moran?

A Completely.

Q And where did that conversation take place?

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A Took place in Mr. Gavin's office.

Q Was anyone else present besides you and Mr. Gavin?

A No.

Q Tell us the substance of that conversation, who said what to whom.

A Well, very frankly, I was a little nervous going there. I didn't exactly understand what was happening. I didn't expect because after we had spoken about Moran I thought that problem was put to bed.

MR. WOLOSKY: Your Honor, I move to strike and I would ask that the witness be confined to saying what was said.

THE COURT:Yes , you were asked for what was said at that conversation, what Mr. Gavin said to you and what you said to him.

THE WITNESS: Specifically John told me that unless I permitted him to fire Don Moran tonight or unless I permitted him to fire him tomorrow he was going to resign today, on the spot.

Q Did you respond to that statement?

A Yes.

Q What did you say?

A Well, I didn't beg but I pleaded very hard. I told him to reconsider, that I thought he was making a

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dramatic mistake; that if he felt Moran should be replaced let us find a replacement before we fire him; that we have had a lot of changes in the organization and I wasn't happy with moving any man in and out. I asked him what his alternatives were, what he would do if he did resign. I remember specifically his answer, he would kick pebbles on the beach. I asked him if he discussed with his wife. He said yes, she was in full accord with his decision. They had spent many nights disucssing it in bed and there was absolutely -- this was it.

I also told him that I thought he was being very selfish. I told him as far as the company was concerned that we had had many changes in management and another change at the head of the company could be a disaster for the company. I didn't think our banks would like it, I didn't think our suppliers would like it. They like continuity. You know, I was very, very concerned.

Q Did there then come a time when you spoke to one or the other of the board members, Mr. Don Silvestri, about him?

THE COURT: Before you leave, does that exhaust your recollection of that conversation?

THE WINESS: No.

Q What else?

A Basically we spent many hours talking. He was as strong as I have ever seen him, unyielding.

What I did ask him --

MR. WOLOSKY: I would move to strike the witness' volunteered statements.

THE COURT: I just don't regard that. I only consider the conversations.

A What I did ask him was to give me a day or two to collect my thoughts and get back to him. I told him he had been with the company a number of years and another day or two or three -- I didn't ask for three, I just asked for one or two -- certainly couldn't make a difference. It took almost 20 minutes just for him to agree to give me that day or so. Finally, we shook hands and I told him I would get back to him within a day or two.

I left, I believe, that evening I called Don Silvestri who was a board member and someone whom I felt --

THE COURT: You can't state what you told the others.

Q Is he also an employee? Was Mr. Silvestri also an employee at that time?

A Yes, he was.

Q As a result of your conversation with Mr. Silvestri, to your knowledge did Mr. Silvestri meet with

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Mr. Gavin at the Carriage Inn in Larchmont?

A Yes, sir.

Q As far as you know did they meet there for several hours the following day or the day after?

A I know what Mr. Silvestri told me.

MR. WOLOSKY: I object, your Honor.

THE COURT: He hasn't said it.

MR. WOLOSKY: Counsel asked it.

THE COURT: No, he didn't.

MR. WOLOSKY: Excuse me, your Honor.

Q After that meeting between Mr. Silvestri and Mr. Gavin did you again speak to Mr. Gavin?

A Yes.

Q When did that conversation take place and where?

A It was on the telephone. I called John, I believe, at his office. I told him I had spoken to Mr. Silvestri and that I would appreciate it if he would allow a few more days postponement, that this decision was too big for me to make and I wished to call a board meeting to specifically discuss his ultimatum.

Q What did he say about a board meeting?

A He asked me when it would be.

I said I would like to hold it as quickly as possible, Friday morning. He said he would happily attend.

I am not sure he said happily attend but he said he would attend.

Q To your knowledge did he sign a waiver in connection with that meeting?

A Yes.

Q Did you have any further conversations between the one you just related and the board meeting of April 6th, 1973?

A No.

Q Then there came a time on about April 6, 1973 that the board meeting was held with the defendant?

A It was held at the offices of Sprayregen & Company in the Pan Am Building.

Q What time did that meeting start?

A Between 8:30 and 9 o'clock in the morning.

Q And which board members were present at that meeting?

A Mr. John Gavin, Mr. Herman Sprayregen, Mr. Richard Bernard, Mr. Howard Wetiz and myself. I chaired the meeting and I asked Mr. Weitz to take minutes of the meeting.

Q Is Mr. Weitz an attorney?

A Yes, he is.

Q Has he taken minutes at other corporate meetings?

A Yes, he has.

Q Was a quorum of the board present at that meeting?

A Yes,there was.

MR. WOLOSKY: I object and move to strike.

THE COURT: State who was present. Who was present at the meeting?

THE WITNESS: Mention it again?

THE COURT: Your father, you, Mr. Bernard, Mr. Gavin and Mr. Weitz?

MR. WEITZ: Right.

Q At that time how many board members in all were there of this company?

A Seven.

Q And there were two absentees?

A That is correct.

Q Do you recall now who the absentees were?

A Yes.

Q Who were they?

A Dr. David Robbins and Don Silvestri.

Q Did there come a time when the meeting was opened? Did there come a time when the meeting was opened that morning?

A Yes.

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Q As chairman of the board did you make an opening statement to the other members present?

A Yes.

Q State what you said, to the best of your recollection at this time.

A I stated that this was a special meeting called to discuss and to consider one very serious problem. I recounted to the Board what had happened between Mr. Gavin and myself. I recounted to the board what had happened to my knowledge his conversation with Mr. Silvestri and my subsequent conversation with John asking to come to the board meeting to have the board make this decision.

When I finished this little talk which took a minute or two or three or four, explaining the ramifications and how I did not want to see a dislocation and the problems we were facing, I asked John, Mr. Gavin, if there was anything he wished to ask -- excuse me, if there was anything he wished to -- if I had left out anything or if there were any changes he wanted to make. Then he very quietly stated, in some form of language, that basically the whole story was a fabrication, that I had made the whole thing up and that there was no substance and truth in my conversation with him, this conversation with Silvestri; you know, that I was just lying.

THE COURT: Lying about what? That isn't clear to me. You made up what part of it?

THE WITNESS: That he had not issued an ultimatum to me; that he was not prepared to resign; that he did like Don Moran but he couldn't care if he stayed on there if that was the wishes of the board. He was prepared to fulfil his duties as president of the company and that he was happy with his position; that the main substance of what I said was untrue.

THE COURT: What else happened?

THE WITNESS: Well, I think I flew into a rage. I don't think I have ever been so upset in all my life. I leaned across the table and started yelling at him. I very frankly lost my cool. I asked him how he could lie like that, why did he bring the whole damn thing about. I put my face right next to his and he just stood there. He didn't answer me. He stayed very cool and didn't answer until I stopped faving for awhile, and I was doing that.

I might have walked out of the room for a second or two. Then when I finally got back -- you know, everybody was quite stunned. John had stated there was confusion. There was no confusion. People were stunned. There was silence.

THE COURT: Did anybody else say anything other than you and Mr. Gavin?

THE WITNESS: My father finally turned to Mr. Gavin and he said "John, did Gerald lie? Did you in fact issue the ultimatum? Did you in fact say you were going to resign? Have you in fact resigned?"

John said, "No, no."

My father kept repeating the question two or three or four times. Finally he just said "Yes, what he said is true, I did resign," and he put down his head.

At that point I asked to recess the meeting, I wanted to speak to John. Everybody left, left the room. I told them we were going to adjourn until later on, after our conversation -- excuse me, I think before that happened, after John had been there I think someone, perhaps my father, made a motion asking the board if they wanted to fire Don Moran. I think the vote was 4 to 1 in favor of keeping him. I think Mr. Gavin voted to have him fired.

I believe after that I asked for a recess and the three other people left the room and John and I stayed there talking quietly.

I apologized for screaming and yelling at him, although I did ask him why he lied. He didn't answer

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that. And we stayed for a couple of hours. I asked him what he was going to do. He said he didn't know.

We spoke about the possibility of money. We spent a good deal of the time talking about money, what he was going to get. I pointed out some of the history of some of the past people who had left the company who had received certain remuneration, certain amounts of money. I pointed out to him that all those people were let go by management; that no one to my recollection had ever quit and received a nickel.

We spoke and we really didn't get any place. I told him regardless of what had happened there I still felt he was a strong sales talent and that if he could come up with some program either working with a distributor, that perhaps we could back him as a salesman. Then he left. I told him we were going to, you know, recess the meeting again. He left anyway.

I think right after he left we recessed the meeting and the board voted to accept his resignation.

The board, just for a lack of anybody else, I became president. And then I think we also voted to make an announcement early Monday morning as to what had taken place.

Q Did you tell Mr. Gavin you were going to meet again

that afternoon?

A Absolutely.

Q In fact, you did meet about what time?

A Whether it was 2 o'clock or 3 o'clock, I don't know.

Q Who was present during that continued meeting of the board?

A The same five people minus Mr. Gavin.

Q And the following day, April 7th of 1973, a Saturday, was there any communication between you and Mr. Gavin?

A In my deposition I didn't recall --

THE COURT: Not what is in your deposition. Just answer the question now.

THE WITNESS: According to John's testimony yesterday that we spoke --

MR. WOLOSKY: I object, your Honor.

THE COURT: Mr. Sprayregen, the question was, as your counsel put it, I believe, did you talk to him thereafter?

THE WITNESS: I apologize. It appears that I did, yes.

Q And do you recall what the substance of that conversation was?

A It was regarding Walter Wolf.

Q Who is Walter Wolf?

A Walter Wolf was someone that John had hired to start Monday and I had called Don Moran to find out --

MR. WOLOSKY: Your Honor, can the witness please limit himself to what was said by him and what was said by Mr. Gavin.

THE COURT: Yes. You have to answer the questions as your counsel asks them. He asked you when you next talked to Mr. Gavin after this meeting on Friday, I believe it was, April 6th. Did you have a conversation and talk with Mr. Gavin?

THE WITNESS: Yes.

THE COURT: When did you have your next conversation with him?

THE WITNESS: I believe it was on Saturday.

THE COURT: Was it in person or over the telephone?

THE WITNESS: Over the telephone.

THE COURT: Who called whom?

THE WITNESS: I called him.

THE COURT: What was the conversation?

THE WITNESS: It was regarding Walter Wolf, who I believe Mr. Gavin had hired on Monday and I just wanted to call and find out what the terms of his agreement with

Walter Wolf were, because we had a president who had left on Friday and we had a man who was starting on Monday whom he hired and I just wanted to get the terms and the agreement between the two. Or perhaps he wasn't supposed to support on Monday but they had reached some accord and I was trying to find out what that agreement was.

That was the only conversation that we had.

Q Did you mention anything to him about coming back to work on Monday morning?

A That is absolutely absurd. Absolutely not. There was a board meeting on Friday, we had decided to make an announcement --

THE COURT: You are volunteering statements. You were asked what the conversation was. Did you state the entire conversation?

THE WITNESS: Yes, I did.

Q Did you also have a conversation with the plaintiff the following day, on Sunday, April 8th?

A Yes, I did.

Q Was that by means of telephone?

A Yes.

Q Did you have -- tell us the substance of that conversation.

A I just called Mr. Gavin to read him a letter that

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we had sent to him. I just wanted to make sure that he was aware of exactly what finally happened in the board meeting and what the company's official position was.

Q Is that the letter of April 8th, 1973?

A Yes, sir.

Q I show you Plaintiff's Exhibit 6 in evidence and ask you if that contains your signature.

A Yes, it does.

Q Is that the letter that you read to the plaintiff at that time?

A Yes, it is.

Q Is that the letter you sent to him?

A Yes, it is.

THE COURT: Did you have any conversation with him at the time you read the letter to him?

THE WITNESS: No.

THE COURT: You just read the letter.

THE WITNESS: I said "John, I have something to read to you." I remember the letter. I said something like "I am sorry."

THE COURT: What did he say, if anything?

THE WITNESS: I am not sure he said anything, your Honor.

THE COURT: All right.

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Q Now, did there come a time when an announcement was made in the Wall Street Journal?

A Yes.

Q And was that put in at the request of the defendant?

A Yes. Well, we made a statement and they published, you know, a statement. We didn't request them to put it in.

Q No, on April 9th of 1973, the following Monday, were you in attendance at the New Rochelle office?

A Yes, I was.

Q About what time did you arrive there?

A About ten of eight, five of eight, five minutes before eight.

Q Was the plaintiff present at the time you arrived there?

A No.

Q Tell us what you did in respect to the plaintiff's office?

A Well, I gathered up his things as neatly as I possibly could, took his books and his papers and his private things and put them in a box or two. Maybe put them either outside the door or right inside the door of his office. In other words, I cleaned out his personal belongings.

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Q Did there come a time when Mr. Gavin arrived at the offices when you were there?

A About ten minutes after I arrived he arrived.

Q At that time did you have a conversation with him?

A Yes.

Q What did you say to him and what did he say to you?

A It was very, very similar type conversation as we had Friday after the recessed meeting. We spoke about his future, what he was going to do. We spoke about money. He made some requests for certain payments which we discussed. Interestingly enough, the conversations were very congenial, no one raised their voice. The emotion was out of it at this point.

Q And did he mention to you something about getting reimbursed for certain expenses on behalf of the defendant at that time.

A Yes.

Q And did say that he would be reimbursed?

A Yes.

Q I show you these expense reports, Defendants' Exhibit E in evidence, and ask you if they were kept in the regular course of the business of the defendant.

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A Yes.

Q And did you agree to reimburse the defendant in connection with those expenses?

A Yes, we did.

Q And on the same date, April 9th of 1973, in accordance with the voucher attached to Defendants' Exhibit E, was a check prepared at your request, which is now Defendants' Exhibit F in evidence?

A Yes.

Q In the sum of $1,526?

A Yes, sir.

Q I want you to look at the reverse side, please. It has initials there. Are those your initials? Were they put there on your authority, do you know?

A They look like they could be my initials, yes, but I am not exactly sure why they are there.

Q You agreed at that time to have the plaintiff get reimbursed in that amount of money?

A Yes, I did.

THE COURT: He was entitled to be reimbursed, wasn't he? You say he agreed to. Wasn't he entitled to be reimbursed?

THE WITNESS: Yes. Everybody is entitled to be reimbursed for their expenses.

Q Did you also mention to him during that conversation about any additional money?

A Yes. We spoke about moneys, as I say, for quite a period of time. John had requested numerous months and again spoke about some of the past offers. Again I pointed out that no one had quit before. He mentioned something about-- we talked about various things. I do believe that he did mention something about vacation pay. When he mentioned that I think I laughed. I told him that I had never heard of presidents being entitled to vacation pay.

We again talked about distributorships and what he was going to do. Finally, to end it, I told him we would give him a check for two weeks and that as far as I am concerned that ended our obligation to him and that I would still be open to any form of business venture. But as far as monetary settlements there would be nothing else.

MR. WOLOSKY: Your Honor, I move to strike that testimony on the grounds that at the start of this trial your Honor denied a motion for leave to amend the pleadings --

THE COURT: It will not be received on any concept of accord and satisfaction because I deny the motion.

Q I show you this check which is Defendants' Exhibit

G in evidence in the sum of $1,538.46 payable to the order of the plaintiff. Is this the check that you referred to that was given to the plaintiff at your direction on that date?

A Yes.

Q And you said this is for two weeks, Mr. Sprayregen. What did the plaintiff say, if anything, at that time?

A Well, I can't say he was thrilled with the amount of money. It was a small amount of money. It was something more than I figured that our legal obligation was. It was some money; it wasn't a lot of money. I don't know if he said anything about it.

Q I show you this document dated April 9, 1973, and ask you to look at it, please.

A (Reading.)

Q Tell us whether that document was prepared at your direction and over your signature?

A Yes, it was.

Q Was that circulated among the personnel?

A Yes, it was.

Q That is of Tuck Industries, Technical Tape?

A Well, probably Tuck Industries and probably to some of the officers and some of the main people in some of our other subsidiaries.

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Q Was it circulated to Steadley, as far as you know?

A I would think so, yes.

MR. PANISH: I offer it in evidence.

MR. WOLOSKY: Your Honor, I object. This is the rankest hearway and most self-serving statement imaginable.

THE COURT: Objection sustained. It will be marked for identification.

xx (Defendants' Exhibit U was marked for identification.)

Q Mr. Sprayregen, do you recall receiving this letter from the plaintiff, April 10, 1973, which has already been marked in evidence?

A Yes.

Q Now, did you respond to that?

A I think I probably did.

Q I show you this letter dated April 12, 1973, and ask you if that is the response that you made?

A Yes, that is correct.

Q Was that sent to the plaintiff?

A Yes, it was.

MR. PANISH: That was marked Defendants' K, I believe, your Honor.

Q Now, what plants of the defendant did Mr. Gavin

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manage and exercise control over?

A Mr. Gavin's responsibility was everything that had to do with tape.

Q Did it have anything to do with the Steadley Company?

A No, sir.

Q Did the Steadley Company have its own president?

A Yes, sir.

MR. WOLOSKY: Your Honor, these are the exact same questions thatcounsel asked at the beginning of this witness' testimony.

THE COURT: Proceed, please.

Q Did the defendant have a customer by the name of W. Evans Paper Company?

A Yes.

Q Is that one of its big customers?

A A good dize top distributor, yes.

Q Where is Evans Company located, out in the mid-west?

A Yes, St. Louis-Chicago area.

Q Did they make purchases directly from Tuck Industries?

A Yes.

Q Now, to your knowledge, did the plaintiff know that

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Tuck Industries had a customer of such a size and account?

MR. WOLOSKY: I object, your Honor.

THE COURT: I don't understand that question, to his knowledge, You will have to develop that on another basis altogether. All he has to say is yes, to his knowledge and that wouldn't mean anything.

Q Well, did there come a time, Mr. Sprayregen, when you learned that Evans stopped purchasing materials from the defendant?

A Yes, Evans had made an arrangement with Spec Tape. Shortly after that --

MR. WOLOSKY: I am going to object, your Honor, and move to strike out the testimony.

THE COURT: Strike out the latter part.

Q Do you know how such an arrangement was made, do you have any knowledge as to that?

A Yes.

Q Through whom?

A I spoke to Evans myself.

Q And --

A We paid a visit to them.

Q Did you understand the plaintiff obtained that account?

THE COURT: Objection sustained.

MR. WOLOSKY: Thank you, your Honor.

Q Now, you were familiar with the 2-1/2 per cent net increment of net income from operations in regard to an amendment made to plaintiff's employment agreement that was contained in the board minutes of 1972?

A Yes.

Q And is reference made to certain exclusions and limitations, do you recall that?

A Yes.

Q And was any conversation held between you and Mr. Gavin regarding the Steadley Company?

THE COURT: As far as the 2-1/2 per cent is concerned?

MR. PANISH: Yes.

A Absolutely.

MR. WOLOSKY: What period of time are we talking about?

THE COURT: Fix the time, please.

Q Tell us when, sir.

A Well, there came a time where John felt that his arrangement did not cover -- his compensation did not cover the full scope of his responsibilities --

MR. WOLOSKY: Your Honor, may I have the witness' answer to the question? I move to strike the volunteered

response.

THE COURT: Yes.

Again, Mr. Witness, you have to give the conversation, not your conclusion as to what was said. Now, there is this resolution of the 2-1/2 per cent of net profits. Did you ever have a conversation with him before that resolution was presented to the board?

THE WITNESS: Absolutely.

Q Tell us the conversation.

THE COURT: Approximately when did you have the conversation with him?

THE WITNESS: It might have been a month, might have been two months prior to the board meeting.

THE COURT: What was the conversation, what he said to you and what you said to him?

THE WITNESS: In essense I believe what was said was that he wanted some form of being able to make more money if the Tape company did well. And I found nothing wrong with that.

We discussed it from percentages. I think I said in the next board meeting we would bring it up for discussion and if there was no problem with it it would get passed.

THE COURT: Was that the entire discussion?

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THE WITNESS: That's the substantive points, yes, sir.

Q And during the plaintiff's employment did he ever make a request or demand upon you for the 2-1/2 per cent increment during this employment period?

A I don't believe there was anything due him, so he didn't make any requests.

MR. WOLOSKY: I move to strike the volunteered portion of that answer.

THE COURT: Yes. Just take the answer he did not make any requests. Strike out the balance.

Q Now, did there come a time in August, August 22, 1974, that a board meeting was held of the defendant?

A I am sorry, could I have that date again, please?

Q Did there come a time on August 22, 1974 that a board meeting was held at which you were present?

A Yes.

Q And various matters were taken up at that time?

A Yes.

Q And did that also include something in respect to the 2-1/2 per cent that we referred to?

A Yes, sir.

Q And certain minutes were taken at that time?

A Yes.

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Q And is it the regular course of this business to have minutes taken of corporate board meetings?

A Yes.

Q You saw the minutes of August 22, 1974?

A Yes.

Q On page 3 I refer you specifically to the certain exclusions regarding the computation. Was that discussed?

A Yes, it was.

Q And is that correctly reflected in the minutes of that meeting now before you?

A Yes.

Q And was one of those exclusions the net income of the Steadley Company?

A Yes, it was.

Q And did it also include an exclusion as to extraordinary items?

A Yes, it did.

Q It also has certain inclusions of things; is that correct?

A Basically the tape companies, yes, sir.

Q That would be all the tape companies of the defendant, not including the bedspring company which is Steadley?

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A That is correct.

Q That would include the subsidiaries, Dominion-Canada, Tuck Limited of England, Technical Tape and Tuck Industries here in the U.S.; is that correct? Those four?

A That would be correct.

Q And to your knowledge are general accounting records kept in connection with these companies concerning the finance and the income?

A Yes.

Q And you know Mr. Roger Lawrence?

A Yes, I do.

Q And what is his position with him?

A He is the president of Steadley.

Q And in addition to his salary is there any contract arrangement between him and the defendant other than his salary?

MR. WOLOSKY: Your Honor, I object to the witness' testifying as to what the arrangement was if there is a written contract.

THE COURT: Is there a written contract?

THE WITNESS: Yes.

Q Do you have knowledge of that contract?

A Yes.

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THE COURT: Any difficulty producing the contract?

THE WITNESS: We can get it.

MR. FANISH: I don't have it available now, your Honor. I want to get to one point. I don't think there is any dispute on it.

MR. WOLOSKY: How can we know there is a dispute unless we see the contract?

THE COURT: You say there is no problem producing it. Produce it in the afternoon session, that is all.

Q Is there one available, to your knowledge, at your office?

A I am sure there will be.

Q Now, aside from the April 5, 1971 agreement, which I believe is Plaintiff's Exhibit 1 in evidence in this case, the written employment agreement with the plaintiff which you are familiar with, did you or anyone else on behalf of the company enter into any other written agreements or modifications with the plaintiff subsequent to that? In other words, was his salary increased from 35 to $50,000 and did you and the plaintiff get together and sign another agreement with respect to the $50,000?

MR. WOLOSKY: I am going to object on the grounds that the exhibits produced here during the course of this

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trial show that there are documents that were signed by the defendant to acknowledge that salary increase. I would ask that it be limited to the plaintiff.

THE COURT: Objection overruled. He is simply asking whether or not a formal written document was signed with respect to the salary increase, with respect to the option, with respect to the bonus, with respect to the election of the plaintiff as president of the corporation and election as a member of the board.

Why are you asking these questions? There is no dispute about that. The plaintiff himself testified there were no documents signed.

MR. PANISH: May I have one moment, your Honor, please?

THE COURT: Yes.

(Pause.)

Q To your knowledge did the plaintiff receive reimbursement for certain automobile expenses, including gasoline and tune-ups and other maintenance?

A Yes.

MR. WOLOSKY: I object to this and move to strike. It is totally irrelevant.

THE COURT: I will let him ask the questions.

Q Did the plaintiff after April of 1973 purchase

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any materials from the defendant as a customer?

A Yes.

Q That is when he went into business for himself which he stated to be Encore Tape & Label?

A That is right.

MR. WOLOSKY: I object, your Honor.

THE COURT: Overruled.

Q And was certain credit extended to him?

A That is correct.

Q And is there still an open account with him which is unpaid, to your knowledge?

A What do you mean by open account?

Q Well, is there still an indebtedness from the plaintiff to the defendant?

A Yes.

MR.WOLOSKY: Your Honor, none of this is pleaded and I am going to object to it.

THE COURT: So what difference does it make? There is no claim with respectto it.

Put the next question to the witness.

MR. PANISH: What I want to state is this: The contract will be on its way down. I would like to reserve to ask him a few questions about that when it comes in this afternoon.

THE COURT: Complete your examination as to all other matters except the contract. Do that now. Have you completed except for the contract?

MR. PANISH: Beg your pardon, sir?

THE COURT: Have you completed your direction of this witness except for the contract which you say is on its way down?

MR. PANISH: I will know in one moment, if your Honor please.

(Pause.)

MR. WOLOSKY: After he completes may I have a few minutes to look at my notes?

THE COURT: Yes.

(Pause.)

MR. PANISH: I have no further questions then, your Honor.

THE COURT: Off the record.

(Luncheon recess.)

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AFTERNOON SESSION

4:00 p.m.

MR. PANISH: Your Honor, I have a witness under subpoena. I won't be more than a few minutes with him. May I take him now, please?

THE COURT: Yes.

MR. PANISH: Mr. Weitz, please.

H O W A R T W E I T Z, called as a witness on behalf of the defendants, after being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PANISH:

Q Mr. Weitz, state your occupation or profession?

A I am an attorney.

Q How long have you been an attorney?

A Since 1960.

Q Are you admitted to the Bar of the State of New York?

A Yes, I am.

Q Did you receive a subpoena to appear in court in this trial?

A Yes, I did.

Q You received that subpoena from the defendants?

A That is correct.

Q And you are here pursuant to that subpoena, sir?

A Yes.

Q Now, were you ever employed by the defendants?

A I was employed by Technical Tape, Inc.

Q And in what capacity were you employed?

A Vice president and secretary and corporation counsel.

Q Were you made a director of that company?

A I am sorry?

Q Were you made a member of the Board of Directors of that company?

A Yes, I was.

Q And as part of your duties did you take minutes of board meetings?

A Yes, I did.

Q Were you present at a board meeting of April 6, 1973?

A Yes, I was.

Q And where did that meeting take place?

A Took place in New York City, the Pan American Building, 200 Park Avenue.

Q And were you acting as secretary there and did you take the minutes of that board meeting?

A Yes, I did.

Q I am going to show you what is now Defendants' Exhibit S in evidence and ask you to look through that, please.

A (Reading).

Q Does that document represent a transcription of the minutes that you took at that time?

A Yes.

Q And did you fix your signature at the end of it?

A Yes.

Q Now, was another board meeting held of this defendant on April 24, 1973?

A I can't recall offhand.

Q I show you what is now Defendants' Exhibit T in evidence. Please look at that and see if it refreshes your recollection.

A Yes, this indicates that a meeting was held on April 24th, 1973.

Q And did you also take the minutes of that meeting?

A Yes, I did.

Q Did you affix your signature at the end?

A Yes.

Q Were those minutes accurately transcribed?

A Yes.

MR.PANISH: I have no further questions.

CROSS EXAMINATION

BY MR. WOLOSKY:

Q Mr. Weitz, I show you Defendants' Exhibit S and I ask you if I am correct that there was no resolution with respect to Mr. Gavin or passedwhile Mr. Gavin was at the board meeting?

A As indicated in these minutes, he was not at the meeting at the time it was reconvened at 3 p.m. in the afternoon.

Q In any event, he was not there when the resolution was passed with respect to him?

A I think I have just answered that question unless I misunderstood it.

Q Is your answer yes?

A He was not at the reconvened meeting that day.

MR. WOLOSKY: I have no further questions.

THE COURT: I would like to see those, please.

MR WOLOSKY: Yes, your Honor (handing).

THE COURT: This meeting started at 8:30. Is there anything in the minutes to show that a recess was taken?

THE WITNESS: I believe so, your Honor. I'd have to see the minutes.

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THE COURT: Here (handing).

THE WITNESS: (Reading).

At page 2, your Honor, it states that"Messrs. Bernard, Herman Sprayregen and Weitz thereupon left the meeting and the meeting was accordingly recessed until later in the day."

THE COURT: Read that again.

THE WITNESS: "Messrs. Bernard, Herman Sprayregen and Weitz thereupon left the meeting and the meeting was accordingly recessed until later in the day."

THE COURT: Was Mr. Gavin present then?

THE WITNESS: At that particular time, at the time it was first recessed, yes.

THE COURT: Hadn't he gone out of the room with Mr. Sprayregen?

THE WITNESS: I think that this sentence that I just read describes when -- my reaction is that he and Mr. Sprayregen, Gerald Sprayregen, and Mr. Gavin were left sitting at the table in a conference room where the meeting was being held when the three of us walked out of the meeting, it being stated that the meeting was being recessed until later in the afternoon.

THE COURT: At a fixed time?

THE WITNESS: No.

THE COURT: No time was fixed?

THE WITNESS: Not to my recollection, your Honor.

MR. WOLOSKY: Would you bear with me for one more question?

Q Mr. Weitz, when did you prepare those minutes, if you recall?

A I can't be sure. My recollection is, though, it would have been -- I am sorry, I would correct that. It would have been either that day or the following business day.

Q Do you have any recollection of preparing them that day?

A No.

Q Do you have any recollection of preparing them the following business day?

A I have a recollection that I prepared these minutes, I dictated these minutes to my secretary very shortly after the meeting. It was either the same day or the following business day. That is my recollection.

MR. WOLOSKY: Thank you. I have no further questions.

MR. PANISH: No further questions, your Honor.

(Witness excused.)

MR. PANISH: I recall Mr. Gerald Sprayregen.

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GERALD SPRAYREGEN, resumed.

MR. PANISH: Aside from the contract with Mr. Roger Lawrence there was one conversation I omitted to ask thiswitness. It will take me one or two questions, if I may.

THE COURT: All right.

DIRECT EXAMINATION (Continued)

BY MR. PANISH'

Q Did Mr. Gavin go to your home in New Rochelle in January of 1974?

A Yes.

Q Was that pursuant to a telephone conversation that you had with him first?

A Yes.

Q Now, at the time he went to your home did you have a conversation with the plaintiff?

A Yes.

Q Tell us the substance of the conversation, what you said to him and what he said to you.

MR. WOLOSKY: I object, your Honor, it is after, considerably after the events in controversy.

THE COURT: I will take it subject to a motion to strike.

A John had called and told me he wanted to see me

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concerning a matter pertaining to Technical Tape.
I was homewith a back injury. I had been home for about three or four months. He came in and we discussed different things. He told me he represented a group that was interested in buying control of our tape division and we discussed that for a while. He also -- we talked about old times and he told me what a terrible mistake he had made by leaving Technical Tape and that he regretted what he had done. We some some more about the possibilities of selling the tape division.

He said he was going to get back to me, and that was it. It was a rather quick meeting.

MR. WOLOSKY: I move to strike.

THE COURT: What difference does it make? It isn't relevant really to the issues in the case.

MR. WOLOSKY: That's why I move to strike.

MR. PANISH: Your Honor, I am through. I just want to reserve my right as to the Roger Lawrence contract. I called and it should be down here. Otherwise counsel may inquire.

CROSS EXAMINATION

BY MR. WOLOSKY:

Q Mr. Sprayregen, on your direct testimony I believe you testified that you had a conversation with Mr. Gavin

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about Mr. Moran in January 1974 or early 1973.

A I said we had a conversation some time prior to our discussion in April. I wasn't exactly sure. I didn't think it was in December. I thought it was later than December of '72. I had guessed perhaps it might have been, you know, around that point.

Q And did you testify that you told Mr. Moran -- Mr. Gavin that he couldn't fire Mr. Moran?

A At one point in our conversation prior to our April meeting I had informed Mr. Gavin that he did not have the right to fire Mr. Moran, and that prior to firing I had to give my permission.

Q And at that time had Mr. Gavin asked that Mr. Moran be fired?

A He let me --

Q Yes or no.

A I am not sure if he had specifically asked, please allow me to fire Moran. He made it known to me that if he had his druthers he would fire Moran.

Q Do you recall giving testimony before trial in this case?

A I did so twice, I believe.

Q Do you recall giving testimony on March 13, 1974?

A Not specifically but I don't deny that I did.

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Q Let me read you from page 45, line 8:

"Q Did there come a time when Mr. Gavin expressed to you dissatisfaction with Mr. Moran?

"A Dissatisfaction?

"Q Dissatisfaction.

"A Yes.

"Q Can you recall when that was?

"A I would say, if I had to put a time frame, some time in early 1973."

Going over to page 46, line 5:

"Q Did either Mr. Gavin or yourself suggest any future course of action?

"A No, not in the beginning.

"Q Did Mr. Gavin say that he wished to fire Moran?

"A At what point?

"Q At this first conversation that you are referring to.

"A No."

Do you recall giving those answers?

A The answers are correct.

Q Did you believe those answers to be true when you gave them?

A Absolutely.

Q Did you believe your testimony to be true this

morning when you gave that?

A My testimony does not conflict with that. Yes.

Q Can you please answer the question yes or no.

A Yes.

Q Mr. Sprayregen, did you say on your direct testimony that Mr. Gavin issued an ultimatum to you?

A Absolutely.

Q And was that ultimatum issued on April 3, Tuesday, 1973?

A It either was issued on a Monday or a Tuesday.

Q Could you tell me what that ultimatum was?

A If I do not permit him to fire Moran tomorrow, he will resign today.

Q Well, let me read you from the minutes of the April 6th board meeting. This is Defendants' Exhibit F.

"The chairman stated that the purpose of the meeting was to consider and act upon an ultimatum issued by Mr. Gavin to the chairman on Tuesday, April 3, 1973, at Mr. Gavin's office in New Rochelle, New York, to the effect that unless the employment of Mr. Don Moran, vice president of marketing of the company, wasterminated by April 6, 1973, Mr. Gavin would immediately resign as a director and as president of the company and its subsidiaries."

Mr. Sprayregen, does that accurately reflect the

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ultimatum that was given?

A Absolutely.

Q And you believe your testimony on what you gave as to the ultimatum, did you believe that was true?

A I didn't testify on the ultimatum this morning.

Q Excuse me?

May I have that read back?

(Answer read.)

A The ultimatum that you were talking about was correct and it still is correct.

MR. WOLOSKY: I would move to strike the volunteered portions of the answer.

THE COURT: Motion is granted as to the latter portion.

Q Now, I believe you stated this morning on your direct testimony that your father, Mr. Herman Sprayregen, at the April 6th board meeting asked Mr. Gavin a question. Did you state that?

A I believe I did, yes.

Q Could you tell me again what was the question that Mr. Sprayregen, the senior, asked Mr. Gavin at that meeting?

A I can tell you the form of the question. The specific words that he used I cannot tell you.

Q Could you tell me that?

A I didn't say that.

A In essence he asked Mr. Gavin if it was true that he had issued an ultimatum to me and that he had stated that unless Moran was fired immediately he would resign.

Q That was the question as you recall it now?

A In one form or another, yes, that is exactly what the question was.

Q Thank you.

Now, I show you Defendants' Exhibit S for identification, which is the minutes of the April 6th board meeting -- it is in evidence. I ask you whether there is any -- was there any resolution passed with respect to Mr. Gavin during the period of time that he was at the meeting?

A No.

Q The only resolution that was passed was after he left?

A No, there was a resolution prior to when he left but not pertaining to him.

Q I ask you to read starting at the bottom of the first page and I ask you to read that paragraph.

(Reading.)

Q Now, does that accurately reflect the course of events and what happened while Mr. Gavin was at the meeting?

A The only perhaps slight correction I would mention

is that Mr. Gavin denied Mr. Herman Sprayregen's question a few times before admitting it. Other than that I think it is accurate.

Q Now, is there anything in that paragraph that states that Mr. Gavin said while he was at the meeting "I resign effective now"?

A No, it doesn't say that here.

Q Thank you.

Mr. Sprayregen, I take it that you got no written resignation from Mr. Gavin?

A No, I did not.

Q Now, was the April 6th meeting reconvened after Mr. Gavin left?

A Yes.

Q And is it your claim that Mr. Gavin was informed of the reconvening of that meeting?

A Absolutely.

Q Well, are you aware that your father testified this morning that Mr. Gavin was not informed?

MR. PANISH: I object to that, your Honor. I don't recall any such testimony.

THE COURT: Objection sustained.

MR. PANISH: I don't think the record reflects that.

THE COURT: The record will speak for itself.

A How my father can state what the conversations I had with Gavin among others is beyond me. If he states so that's to the best of his information.

MR. WOLFOSKY: I move to strike the volunteered statement of the witness.

THE COURT: Stricken. I sustain the objection to the question.

Q Mr. Sprayregen, this morning on direct testimony didn't you testify that you had certain conversations with Mr. Gavin on Saturday and Sunday, April 7th and 8th?

A Yes, I did.

Q Isn't it a fact that on March 13th, 1974, when you gave a deposition in this you couldn't recall those conversations?

A No, that is not a fact. I couldn't recall the Saturday conversation. I recalled the Sunday conversation.

Q Let me read it, page 109, line 8:

"On April 8th, did you call Mr. Gavin?

"A Not that I know of.

"Q At any time after Friday, April 6, 1972, did you call Mr. Gavin?

"A I am sure I have but I don't remember."

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Did you believe that testimony to be true when you gave it?

A Absolutely.

Q Did you believe your testimony to be true this morning when you gave that?

A Absolutely.

Q Did you make any notes or memoranda of the conversations on the Saturday or Sunday?

A I did not.

Q Between the time that you gave the deposition and this morning when you gave your direct testimony you had no documents with which to refresh your recollection; is that true?

A That is correct.

Q I believe you testified this morning that on April 9, 1973 you cleaned out Mr. Gavin's desk in his New Rochelle office?

A That is correct.

Q Your office was in New York at the time, wasn't it?

A That is correct.

Q And isn't it a fact that you went to the New Rochelle office for the express purpose of cleaning out Mr. Gavin's desk?

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A Absolutely.

Q Mr. Sprayregen, isn't it a fact that Mr. Moran did not get along with the other executive officers of Technical Tape?

A Pleasebe specific. There are a lot of other officers. He didn't get along with a lot of them. He got along with some of them.

Q Who is Mr. Sauler?

A He is the president of the company.

Q And in 1973 what was his position? Was it vice president of manufacturing?

A Yes.

Q Isn't it a fact that Mr. Sauler and Mr. Moran hated each other?

A I think that is a fair observation.

Q Isn't it a fact that in 1974 you made Mr. Sauler president?

MR. PANISH: Object to that.

THE COURT: Sustained.

Q Isn't it a fact in 1974 Mr. Sauler became president of Technical Tape?

MR.PANISH: Objection, your Honor.

THE COURT: What is the relevancy of it? I will let him answer but it really isn't relevant.

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MR.WOLOSKY: I have one more question along this line if you will bear with me.

A Yes, the board, not myself, named him president.

Q Isn't it a fact that at or about the time that you made -- that Mr. Sauler was made president, Mr. Moran was fired?

A No.

Q Isn't it a fact at or about the time Mr. Sauler became president, Moran left the company?

A No.

Q I take it Mr. Moran is no longer with the company?

A No longer with the company.

Q Mr. Sprayregen, did you testify this morning that no one who resigned had gotten any severance pay from Technical Tape?

MR. PANISH: Objection, your Honor. What other people did or didn't do is immaterial to the issues in this case.

THE COURT: I think you asked questions on it, didn't you?

MR. PANISH: I don't recall getting into any of that.

THE COURT: My recollection is you did. I will allow it.

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Q Was that your testimony this morning, Mr. Sprayregen?

A That no one who resigned received any -- no, that was not my testimony.

Q Well, didn't you testify this morning that when asked by Mr. Gavin about severance pay, you told him he couldn't get any severance pay because no one who resigned got severance pay?

A What I did say, I believe, is that the other officers of the company who had left had left at the company's request and there was a difference between any termination pay if a man would quit or if he would be fired by the company. That is what I believe I did say.

Q Did you tell him that because he had resigned he couldn't receive any severance pay?

A I said because he had resigned he wasn't entitled to any severance pay.

Q Didn't you say that no one who resigned had ever gotten any severance pay?

A I don't believe I made that statement.

Q Isn't it a fact that Mr. Edward Chappell was president of the company before Gavin?

A Absolutely.

Q And isn't it a fact Mr. Chappell resigned his

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position?

A Incorrect. He resigned at the request of the board. There is a difference.

Q Isn't it a fact he resigned?

A There is a difference. He didn't leave the company for a better position.

Q Please answer my questions. Isn't it a fact that Mr. Edward Chappell resigned his position as president of the company, yes or no?

MR. PANISH: I object to the whole line.

I don't see how it is german here.

THE COURT: The witness related a conversation which he stated he had with the plaintiff. I will allow it.

A Mr. Chappell was asked to leave. I don't know what you want to call when a president is asked to leave and he resigns; all right?

Q Mr. Sprayregen, would you please answer my question, yes or no, did Mr. Edward Chappell resign as president --

A At the request of the board.

Q -- as president of Tuck Industries and Technical Tape?

A He resigned at the request of the board.

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Q Is this his resignation (handing)?

A (Reading) Yes. I drew it up for him.

MR. WOLOSKY: I would offer this as the next plaintiff's exhibit in evidence.

MR. PANISH: May I see it, please?

MR. WOLOSKY: You have seen it for two days.

(Pause.)

MR. PANISH: I object on the ground it has no materiality to the issues here. It doesn't prove or disprove anything.

THE COURT: If it doesn't it wouldn't be considered. It may be marked in evidence, received in evidence.

xx (Plaintiff's Exhibit 11 was received in evidence.)

Q Mr. Sprayregen, isn't it a fact that Mr. Chappell got $35,000 severance pay?

MR. PANISH: I object to that, your Honor. I think that is highly prejudicial.

THE COURT: What is prejudicial about it? The witness testified as to a conversation he had with the defendant with respect -- with the plaintiff with respect to the plaintiffs under which severance pay is granted. I don't think it is really relevant. Of course, it all depends on the contract this plaintiff had with the de-

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fendant. But we have so much irrelevant material, a little more isn't going to hurt now.

MR. WOLOSKY: I appreciate your bearing with me, your Honor.

A I have no idea what Mr. Chappell received.

Q Is this an agreement with respect to Mr. Chappell's termination(handing)?

A (Reading) He apparently had a contract.

Q Is this an agreement with respect to Mr. Chappell's termination?

A It apparently is so, yes, sir.

MR. WOLOSKY: I would offer this as the next defendants' exhibit.

MR. PANISH: I object on the ground it has no materiality to the issues in this case. There might have been entirely different circumstances in respect to the contract, possibly in respect to a compromise. I don't see how it would be relevant in this case and I therefore object to it. I think it shouldn't be received in evidence for any purpose.

THE COURT: Objection overruled.

xx (Plaintiff's Exhibit 12 was received in evidence.)

Q Mr. Sprayregen, didn't Mr. Chappell have a written

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employment contract with Technical Tape?

A I believe he did.

Q Isn't it a fact that when he resigned you asked him for a written resignation?

A I asked for his resignation. I agreed to do certain things if he would resign, that is correct.

Q Didn't you ask for a written resignation?

A When we gave a man a substantial amount of money and he had a contract and we asked him to resign, that is correct.

Q Couldyou please answer my question yes or no, Mr. Sprayregen.

A I am sorry. You are right.

Q Did you ask him for a written resignation?

A It was sort of like a package deal. He gave us something, we gave him something, yes, I did ask him for a written resignation.

Q Thank you.

I show you Defendants' Exhibit N in evidence, the minutes of a board of directors meeting held on August 22, 1974. I ask you whether those minutes are signed.

A. This copy doesn't appear to be.

Q Mr. Sprayregen, do you know who prepared those minutes?

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A Mr. Fox.

Q Could you be sure without his signature?

A Yes.

Q Do you know when he prepared them?

A Some time after August 22nd or perhaps August 22nd, 1974.

Q But you don't know when he prepared them, do you?

A Specifically, no.

Q Now, page 3 of those minutes reflect a resolution with respect to a 2 per cent increment incentive plan that Mr. Gavin had while he was with the company.

THE COURT: Isn't it a 2-1/2 per cent?

MR. WOLOSKY:Yes, your Honor.

Q Is that correct?

A That is correct.

Q And isn't it a fact that the 2-1/2 per cent plan was voted to Mr. Gavin by the board of directors on April 25th, 1972?

A That is correct.

Q And isn't it a fact that between April 25, 1972 and August 22, 1974, that the board made no exclusions with respect to that plan?

A No.

Q That is not true?

A That is not true.

A Do you have minutes of any other meeting prior to August 22, 1974 that reflect exclusions?

A No, I do not.

Q Do you know if your counsel has them?

A No, I don't think he does.

Q Well, do you have any document here today that reflects exclusions prior to August 22, 1974?

A There are no documents. Only verbal conversations.

Q These verbal conversations take place at board of directors meetings?

A Just in the first one.

Q Which one was that, April 25th?

A I believe that is correct.

Q Did you have one or more than one conversation with respect to exclusions?

A Now, I am a little confused with the question. Board of directors or me myself with other members of the board or with Mr. Gavin?

Q Mr. Sprayregen, you testified that there were oral discussions regarding exclusions.

A I didn't necessarily say at board meetings.

Q Well, were they at board meetings?

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A I am not sure if they were.

Q Was there one or more than one?

A It was pretty well stated and pretty well --

Q Mr. Sprayregen, will you please answer my questions.

MR. PANISH: He is answering the questions and counsel doesn't give him an opportunity to finish it.

THE COURT: Put your question again, please.

Q Mr. Sprayregen, was there one conversation or more than one conversation regarding exclusions?

A There was a conversation prior to the board meeting that I had with Mr. Gavin; there was a conversation at the board meeting that date. I don't think, very frankly, there were any other conversations that I am aware of because it was pretty well stated. There were a few things up in the air but it was stated what the exclusions were. Mr. Gavin knew them and the rest of the board to my knowledge knew them. I certainly knew them because it was my plan.

Q And were those conversations the ones that you testified to this morning?

A I am not sure exactly what I did testify to this morning regarding that.

Q Well, after that meeting, am I correct, until August 22, 1974, you had no conversations or discussions regarding exclusions?

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A I didn't say that.

THE COURT: After what meeting are you referring?

MR. WOLOSKY: After the meeting on April 25, 1972.

A I don't say that. I am saying what I do not have is a specific recollection of any conversation.

Q You don't recall any between those two dates?

A There probably was something that came up around the time of Mr. Gavin's resignation.

Q As you sit here now do you recall any conversations after the April 25th board meeting to and including the August 22, 1974 meeting?

A Vaguely, yes, I do.

Q And didyou testify about that this morning when your counsel asked you about discussions regarding exclusions?

A I am not sure what I did testify to this morning.

MR. PANISH: I didn't ask him the question in that form this morning the way counsel put it now. I think it is an unfair question. I object to it, your Honor.

THE COURT: Overruled.

Q Did you tell us about that conversation this morning in response to your counsel's inquiry?

A I told my counsel everything I was aware of,

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as I am telling you everything that I am aware of.

Q Since this morning did you become aware of any other conversations?

A I would particularly appreciate it if you didn't scream at me in the manner you are doing.

Specifically referring to what, the exclusions?

Q Right, sir.

A As I stated a few moments ago I have a faint recollection of about the time of Mr. Gavin's resignation this question coming up. I can't state the date, the time, the place but I have a faint recollection that this was brought up. I myself thought it was resolved.

I think one of the board members said it seems to be a slightly open point. But I can't tell you chapter and verse unfortunately.

MR. WOLOSKY: I move to strike the volunteered portion of that answer.

THE COURT: I said a dozen times I am only considering relevant evidence.

Q Have you gotten that faint recollection since your testimony this morning?

A Fror your prodding, yes.

Q Now, Mr. Sprayregen, do you know when Mr. Gavin's contract would have expired had he remained in the employ

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of the defendants?

A I assume some time around April of '74.

Q Wasn't the resolution at the August 22, 1974 board meeting passed after his contract would have expired?

MR. PANISH: I think that is obvious, your Honor, I don't know logically. I object to it, your Honor.

THE COURT: Why are you objecting to it?

MR. PANISH: All right, withdraw the objection, your Honor.

A Yes.

Q Wasn't the resolution passed at this August 22, 1974 board meeting after the commencement of this litigation?

A Yes.

Q And wasn't it prepared after you testified before trial on March 13, 1974 that you didn't recall any of the minutes referring to Mr. Gavin?

A Excuse me, the question is vague. Please re-ask it and I will try to give you an answer.

Q Mr. Sprayregen, wasn't this resolution passed after the first time you gave testimony in this case?

A When did I give testimony the first time?

Q March 13, 1974.

A Obviously, yes.

Q Wasn't that resolution prepared for this litigation

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for the purpose of reducing the plaintiff's claim?

A I don't believe so, no.

MR.WOLOSKY: I have no further questions.

MR. PANISH: Very brief, your Honor, please.

THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MR. PANISH:

Q Do you recall when Mr. Don Moran left the defendants' employ?

A I do not.

Q Do you recall whether it was the beginning of 1974?

A It was in probably the spring of '74.

Q Now, in connection with Plaintiff's Exhibits 11 and 12, that is the Chappell resignation and the agreement of April 21, 1972, were the circumstances in respect to Mr. Chappell different than the circumstances in respect to Mr. Gavin in this case?

A Completely.

MR. WOLOSKY: Object to the form of the question.

THE COURT: I will allow it.

A Completely different.

MR. PANISH: I have no further questions,

your Honor.

MR. WOLOSKY: I have none, your Honor.

THE COURT: The witness is excused.

(Witness excused.)

THE COURT: Call the next witness, please.

MR. PANISH: He is in the witness room, your Honor. Mr. Herbert Degnan, your Honor, please.

MR. PANISH: I want to note, I don't believe the Lawrence contract is in court yet. I may have to recall him for a few minutes tonight or tomorrow morning, if I may.

H E R B E R T D E G N A N , resumed.

REDIRECT EXAMINATION (Continued)

BY MR. PANISH;

Q Mr. Degnan, from the time you had the recess in your testimony from this mroning until now, were certain books and papers and accountants' statements produced from the defendant?

A Yes.

Q And after having looked at those books and records do you now have in your possession the entries concerning the book of the 1971 figures of the defendant companies together with its subsidiaries?

A Yes.

Q And will you briefly describe for us the type of

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entries kept in that book? We will take '71 first, if you please.

A Basically, a separate set of books is kept for each of 75 companies. In order to summarize the results to publish the numbers that appear in the annual shareholders' report, the numbers each month and at the end of each year are carried over onto records carrying the numbers from the general ledger into a summary sheet and under the generally accepted accounting principles certain adjustments have to be made for inter-company transactions. That consolidating income statement represents the consolidated numbers that appear in the annual report, and this consolidating income statement shows the breakdown of all items of income and expenses between the various companies.

In addition to that the same numbers are carried into another book of account which gives the details of the companies in a bound book prepared in the ordinary course of business, which again show separate profit and loss statements for each company supported by back-up pages showing the details of the items that appear on the summary P and L.

I have the book for December '72 and December '71 and I have the consolidating P and L statements used in preparing the published annual reports for 1971 and 1972.

Q Take the '71 book first. Do you have that,

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please, the bound book?

A Yes.

Q This 1971 book, Mr. Degnan, is this kept in the regular course of the business of the defendants?

A Yes.

Q Is it the regular course of business to maintain this book?

A Yes.

MR. PANISH: I offer it in evidence, your Honor.

MR.WOLOSKY: No objection.

xx (Defendants' Exhibit V was received in evidence.)

Q Now, from Defendants' Exhibit V in evidence, the '71 book, I believe you stated that a summary consolidating income tax statement is prepared for the various subsidiaries?

A Yes.

Q And do you have that in your possession?

A Yes, I have the only available copy which I prefer to use a photocopy, which is a copy of the original because this is the only record we now have available in the company.

Q Is that record kept in the regular course of business of the defendants?

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A Yes, it is.

Q Is it in the regular course of business to keep that record?

A Yes.

MR. PANISH: I offer it in evidence. Then I will ask the witness to explain it.

MR. WOLOSKY: NO objection.

(Defendants' Exhibit W was received in evidence.)

xx

Q Now, Mr. Degnan, were certain adjustments made in Defendants' Exhibit W, which is the consolidating P and L statement of these companies?

A In 1971 the independent public accounts made some minor adjustments to the numbers. The numbers, after reflecting the adjustments made by the independent public accountants, are reflected in the consolidating P and L statement. Those adjustments are not reflected in the book. The book was prepared before the final accountants numbers were prepared.

Q And does Defendants' Exhibit W contain the records in respect to the subsidiary companies?

A Yes.

Q Now, in respect to that will you be good enough to look at Defendants' W and give us an itemized breakdown

in respect to the companies that we asked you about this morning.

A Technical Tape, Inc. --

Q That is the net income now.

A Which is identified in the record as TTI, showed a net operating loss of $140,000.

Tuck Industries, Inc. identified in the record as Tuck, had an operating profit of $427,000.

As a result of an inter-company loss in selling inventory from one company to another, between the two companies an adjustment is made in accordance with generally accepted accounting principles, increasing that income by $45,000. So that the total combined income of Technical Tape, Inc. and Tuck Industries, Inc. then adds to $332,000.

Dominion Tape of Canada, which is identified or characterized as Canada on this record, earned as profit or operating income of $428,000.

Technical Tape, Limited of England, identified on here as England, earned a profit of 68,000.

A combined profit which does not show on that sheet but which I have added up, shows a total of $828,000.

Now, in the adjustment column there is an $18,000 adjustment for inter-company profit and inventory

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as a result of transactions between Tuck and the Canadian company, reducing the 828,000 to $810,000.

So that the total consolidated income of all of the companies essentially in the tape business, which excludes the Steadley Company, totalled $810,000.

The operating income from Steadley, as shown on the record, is $399,000. The 810,000 added to 399 equals the published consolidated income of 1,209,000 which was certified and appears in the published annual report of Technical Tape, Inc. and subsidiaries.

Now, is there a similar book kept for the year 1972 at Defendnats' Exhibit V in evidence?

A Yes, there is. This book is after giving adjustments made by the certified public accountants in connection with their annual aduit.

Q Is this book kept in the regular course of business of the defendants?

A Yes.

Q And is it the regular course of their business to keep such records?

A Yes.

MR. PANISH: I offer it in evidence.

MR. WOLOSKY: No objection.

xx (Defendants' Exhibit X was received in

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evidence.)

Q Mr. Degnan, with respect to Defendants' Exhibit X, the 1972 book which we referred to, was there then also prepared a similar summary of consolidated income statement as there was for the year 1971?

A Yes.

Q And do you have such a statement?

A I have a copy of the original statement.

Q Is that statement kept in the regular course of business of the defendants?

A Yes, it is.

Q Is it the regular course of their business to keep such a record?

A Yes, it is.

MR. PANISH: Offer that in evidence, your Honor, please.

MR. WOLOSKY: No objection, your Honor.

xx (Defendants' Exhibit Y was received in evidence.)

Q Now, Mr. Degnan, in reference to Defendants' Exhibit Y will you be good enough to give us a similar itemization as you did in respect to Defendants' Exhibit W except, of course, this is for 1972.

A Yes. Technical Tape, Inc. showed a net operating

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loss of $297,000.

Tuck Industries --

THE COURT: 297?

THE WITNESS: Yes. It is the first column, third item up from the bottom. The item in brackets indicates a loss.

THE COURT: All right.

THE WITNESS: Tuck Industries showed an operating profit of 869,000. So that the combined total of TTI and Tuck was 572,000. The Canadian company showed a $119,000 profit, the English company showed a $15,000 loss. The total, which does not appear on this work sheet, comes up to $676,000.

Q As a profit?

A As a combined profit of the tape companies before giving effect to any accounting adjustments required by inter-company transactions.

There was a further adjustment which shows up in the adjustment column. You can see it as $6,000, which eliminates from depreciation depreciation on assets transferred from one company to another where under the accounting rules depreciation is not recognized in preparing consolidated returns. So that the combined profit of the total tape companies was $682,000.

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Steadley Company showed a profit of $883,000. The 682 added to the 883,000 equals $1,565,000, which is the income reflected on the annual report certified by independent public accountants and published for the year 1972.

Q Now, taking the 1972 net income figure that you mentioned of 682,000, which excludes Steadley, and making a comparison with the similar figure for 1971, does it show a profit or a loss for this company?

A It shows --

THE COURT: They both show a profit but the year 1971 showed a greater sum.

THE WITNESS: That is correct.

THE COURT: The difference of $128,000; is that correct?

THE WITNESS: That is correct, your Honor.

Q So there would be no computation of the 2-1/2 per cent increment, excluding Steadley, if we assume that fact?

A That is correct.

Q Now--

A With one exception. The numbers that I have presented are the bottom line numbers after extraordinary items. I believe the original minutes that I read

indicated that extraordinary items would be excluded in any computation of the bonus, although extraordinary items were not defined in the original 1972 board resolution.

Q Now, if you took the special item or the extraordinary item for each of these companies, can you tell us what the figures are in reference to and exclusion regarding them?

A If you took the income from the tape companies alone before extraordinary items, the 1972 year the tape companies showed a profit of 203,000 comparied to a profit of 335,000 in 1971.

Q And the difference in those two figures would be what?

A 1972 is $132,000 less than 1971.

If you include Steadley but exclude extraordinary items the income from operations --

MR. WOLOSKY: I am going to object because the minutes that Mr. Degnan referred to refer to a category of special items and he seems to be referring to extraordinary items in the way that that term is used in the preparation of financial statements. There has been no testimony which would indicate that that is the fact, that the term special items in the minutes and the term extraordinary items the way Mr. Degnan are using them

are the same. I would object to his testimony.

THE COURT: Where is the resolution for August 1974?

MR. PANISH: Plaintiff's Exhibit 3, I believe.

MR. WOLOSKY: In April '72.

THE COURT: It just states "and certain other exclusions." It doesn't define them.

MR."WOLOSKY: That is the point, your Honor. There is no foundation for this witness' testimony regarding what is to be and what is not to be excluded.

THE COURT: It is spelled out in the August 1974 resolution. That is what the witness is referring to now, is that right, Mr. Degnan?

THE WITNESS: Yes.

MR. WOLOSKY: If that is the understanding I will withdraw the objection.

THE COURT:He is following the resolution of 1974 and he is giving you the figures. There is an interest item that is excluded too. I believe that is so. I don't have the resolution in front of me.

THE WITNESS: No, it includes interest, your Honor. It excludes extraordinary items and excludes Steadley.

THE COURT: What else?

THE WITNESS: Steadley, excludes Steadley.

THE COURT: The exclusions are Steadley and extraordinary items?

THE WITNESS: Right. It includes interest and taxes.

Q That is the August '74 resolution?

A Yes.

MR. PANISH: I would like to point out, your Honor, in Plaintiffs' Exhibit 3 in evidence, which is the April 25, 1972 minutes, special reference is made that it excludes special items. Then later on it says that it is subject to limitations and other exclusions. In other words, there is a specific reference made to an exclusion of special items.

THE COURT: What exhibit are you referring to?

MR. PANZER: Plaintiff's Exhibit 3 --

THE COURT: I just referred to that but you are not citing it correctly. I have it in front of me. I just referred to it. "And certain exclusions as later may be determined by the board of directors. It was the consensus of the board Mr. Gavin's per cent is to be subject to limitations based on the earnings of the acquired companies and to certain other exclusions that may later be determined by the board of directors."

Now, you are contending that the exclusions were decided upon in August 1974.

MR. PANISH: I had reference to the sentence before that. The 4th line, "Mr. Gavin will be entitled to receive 2-1/2 per cent of the net income of the company exclusive of special items."

Q I would like to ask the witness whether it is good general accounting practice to exclude general items as appears in this resolution?

MR. WOLOSKY: I would suggest that no witness can define special items as listed here. This is a matter of contract. What the board of directors did later on was carry out their definition of the term. That is all there is to that. In any event, under your theory here, if Steadley was properly excluded, then there is no sum due under the 2-1/2 per cent and you don't have to get into any other areas.

MR. PANISH: Precisely, your Honor.

Q In '73 there is no claim made --

THE COURT: I dismissed that at the end of plaintiff's case. Have you forgotten you made the motion? The only contention was made with respect to 1972 as against 1971.

Q Do you know Mr. Roger Lawrence of the Steadley

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Company?

A Yes, I do.

Q Did he have his own special incentive bonus that he received from the parent company?

A Yes, he did.

MR. WOLOSKY: Your Honor, do they have the contract here?

THE COURT: Wasn't that the contract you were going to produce?

MR. PANISH: It is also reflected in one of the exhibits.

MR.WOLOSKY: If he tells me what he wants maybe we can stipulate to it.

THE COURT: Show it to Mr. Wolosky.

(Pause.)

MR. WOLOSKY: No objection.

MR. PANISH: I am reading from the June 28, 1972 proxy statement.

"Mr. Lawrence's five-year employment contract expires in 1975 and provides for direct compensation at the annual rate of $38,000, plus 3 per cent of the net income before taxes and interest up to $400,000, and 5 per cent of the net income in excess of $500,000 of the company's subsidiary, Steadley Company, Incorporated."

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No further questions.

MR. WOLOSKY: No questions of the witness, your Honor.

THE COURT: You are excused, Mr. Degnan.

(Witness excused.)

THE COURT: Call your next witness witness.

MR. PANISH: I don't know if thereis anyone in the witness room, your Honor. May I have a moment?

THE COURT: Mr. Panish, I don'tknow either. You are the lawyer presenting your witnesses. I am only presiding at the trial.

MR. PANISH: Sometimes they walk and they go around.

THE CLERK: There is a Mr. Greenberg.

MR. PANISH: I think I exhausted my witnesses for the day, your Honor.

THE COURT: I told you we would sit until 6. How many more witnesses do you have?

MR. PANISH: May I have a moment?

THE COURT: Yes. Confer with your associate.

MR. WOLOSKY: I was hoping we could conclude today, your Honor.

THE COURT: If he doesn't have his witnesses, I am not going to hold him to it. He should have had them

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How many more witnesses?

MR. PANISH: I think I have about four more, your Honor. I think two of them are going to be very short, very brief.

I will have them herethe first thing in the morning, your Honor.

THE COURT: We will resume at 10 o'clock in the morning.

(Adjourned to Wednesday, January 8, 1975, at 10:00 a.m.)

RDjw 1

JOHN A. GAVIN

v. 73 Civ. 2120 (EW)

TECHNICAL TAPE, INC. and
TUCK INDUSTRIES, INC.

January 8, 1975
10:00 A.M.

Trial Resumed

THE COURT: Please call your next witness.

MR. PANISH: Your Honor, I have another witness that should be excluded from the courtroom. May we have him outside, please?

THE COURT: Yes.

R I C H A R D B E R N A R D , called as a witness for the defendants, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PANISH:

Q Mr. Bernard, where do you reside?

A 25 Central Park West in Manhattan.

Q And what business are you in?

A I'm in the carpet distributing business.

Q And have you been a member of the board of the defendant, Technical Tape, since August of 1972?

A Yes, I have.

Q Were you ever an employee of any of the defendants here?

A No.

Q Now, did there come a time when a board meeting was convened on April 6th of 1973?

A Yes.

Q And were you present at that board meeting?

A Yes, I was.

Q And in addition to yourself as a director could you tell us what other directors were present at that time?

A Gerald Sprayregen, Howard Weitz, Herman Sprayregen, John Gavin, and myself.

Q And were there any other directors that were absent at that meeting?

A Yes, there were.

Q Who were they?

A Dr. David Robins and Don Silvestri.

Q Where did that meeting convene?

A At 200 Park Avenue.

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Q About what time did it start?

A Approximately 8:30 in the morning.

Q Now, at the time the meeting started who was the chairman of that meeting?

A Gerald Sprayregen.

Q Did he make a statement to the board as to the purpose for which the meeting was being held?

A Yes, he did.

Q Tell us what he stated to the best of your recollection.

A Mr. Sprayregen called the meeting to order and indicated that the meeting was called -- it was a special meeting and it was called because John Gavin had issued an ultimatum to him to the effect that the board should fire Mr. Don Moran or else Mr. Gavin would resign.

Q And what happened after he made that statement?

A There was a shouting match that took place for at least an hour, maybe an hour and a half.

Q Between whom?

A Between Mr. Sprayregen and Mr. Gavin.

Q Were you present at that time?

A Yes, I was.

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Q Now, after that argument between them what occurred?

A Well --

THE COURT: Before you leave that, did Mr. Gavin say anything?

THE WITNESS: Actually it was Mr. Spravregen that was doing most of the shouting. Mr. Gavin was talking. There was dialogue back and forth between Mr. Sprayregen and Mr. Gavin but it was not the most well organized meeting I have ever attended. There was yelling and screaming going on. I guess that's the best way to describe the next hour or so. Maybe it was an hour and a half.

Q And after that did Mr. Herman Sprayregen say anything?

MR. WOLOSKY: I am going to object.

THE COURT: Please don't lead the witness.

Q Did anyone else then say anything?

A Yes.

Q Who?

A It was Mr. Herman Sprayregen, in what appeared to be a pacifying tone, asked Mr. Gavin, after he had repeatedly denied the fact that he had issued this ultimatum, Mr. Herman Sprayregen asked several times

whether in fact Mr. Gavin had issued the ultimatum to the board.

And after two, three maybe even four times of quietly asking Mr. Gavin whether in fact he did make this ultimatum, Mr. Gavin acknowledged that he had made the ultimatum.

Q Did the plaintiff at that time withdraw his ultimatum?

A No, he did not.

MR. WOLOSKY: I am going to object, your Honor.

THE COURT: You are certainly leading him and I must say that you are not to lead the witness.

MR. WOLOSKY: I move to strike, your Honor.

THE COURT: Strike the answer.

Q Did the plaintiff then state anything?

A Well, if I can put it into my own words actually what happened.

THE COURT: No, as best you recall the substance of what was said by the persons who were present then. Not your conclusions but the substance of what the parties said.

THE WITNESS: Mr. Sprayregen, Herman Sprayregen

asked Mr. Gavin a number of times whether in fact he had made the ultimatum to the board.

After the third or fourth time Mr. Gavin admitted that he had made such an ultimatum. The ultimatum being that unless the board fired Don Moran he would resign.

At that point there was a moment of silence. A motion at the juncture was made whether or not to fire Mr. Don Moran. There was a vote. The vote being 4 to 1 of obtaining Mr. Moran's services. Mr. Gavin was the dissenting vote.

At that point, as best as I recall, the meeting was adjourned to meet at a later time that day, the time not being specified. The meeting did resume later in the afternoon.

At that point Mr. Gavin was not present, and the board voted to accept Mr. Gavin's resignation. In addition to that the board voted to elect Mr. Gerald Sprayregen as president of the company. The board also voted not to send out a press release until Monday. This was a Friday that the meeting had taken place, and that a press release should be sent out on Monday.

THE COURT: You say they voted to accept his resignation. He didn't say there that he would resign.

Did he tender his resignation at the meeting?

THE WITNESS: I accepted it as a tendering of a resignation.

THE COURT: What did you accept, his statement?

THE WITNESS: When a man calls or requests a special meeting of the board of directors to specifically vote upon an ultimatum, the ultimatum being it is either him or me, yes, I consider that, the "or me" a resignation.

THE COURT: Is it your understanding this meeting was called at the request of Mr. Gavin?

THE WITNESS: Yes, sir.

THE COURT: All right, proceed.

Q Were all the board members present in the afternoon session that were present in the morning with the exception of Mr. Gavin?

A With the exception of Mr. Gavin, yes.

Q Did you at any time while being a member of the board participate in the management of these defendant companies?

A No, sir.

Q Did you participate in any supervision of them?

A No, sir.

Q Did you receive any compensation from them?

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A No, sir.

Q Did you subsequently attend a board meeting of the defendant Technical Tape on April 24, 1973?

A Yes.

Q While you were in attendance at that meeting were the minutes of April 6, 1973 read?

A Yes, they were.

Q Were they approved?

A Yes, they were.

MR. PANISH: I have no further questions, your Honor.

CROSS EXAMINATION

XXX BY MR. WOLOSKY:

Q Mr. Bernard, you said you are a carpet distributor now.

A Yes.

Q What is the name of your firm?

A Benajmin Berman, Inc.

Q On April 6, 1973, you were a director of Technical Tape, were you not?

A Yes, sir.

Q And did you know Mr. Gerald Sprayregen?

A Yes, I did.

Q Is he associated with Sprayregen Securities?

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A Yes, he was.

Q Were you associated with Sprayregen Securities?

A Yes, I was.

Q What was your position at Sprayregen Securities?

A Vice-president and a director.

Q And are you still a director of Sprayregen Securities?

A Yes, sir.

Q Are you still employed in any way by Sprayregen Securities other than being a director?

A Yes. I am president but I'm not employed. I receive no remuneration at this point from Sprayregen Securities.

Q Well, when did your remuneration stop?

A Actually, I was never paid by Sprayregen Securities. I was paid by the parent, Sprayregen & Company. That stopped at the end of November 1973.

Q Did you also have a position with Sprayregen & Company?

A Yes, same positions.

Q And do you still have those positions today?

A I am a director and I'm president of Sprayregen & Company.

Q Do you receive any remuneration whatsoever

from Sprayregen & Company at this particular point?

A No, I do not.

Q And on April 6, 1973, were you associated in any way with the Stratton Group Limited?

A Yes.

Q And what was your position on April 6, 1973 with the Stratton Group Limited?

A I was a director.

Q Did you receive any remuneration, directly or indirectly, from the Stratton Group Limited on April 6, 1973?

A No, I did not. Well, indirectly because Stratton owned Sprayregen and I received a salary from Sprayregen. But nothing from Stratton.

Q Do you still maintain a position with the Stratton Group Limited?

A Yes, I do.

Q What is that position?

A I'm a director.

Q Do you receive any remuneration today from the Stratton Group Limited?

A Yes.

Q And how much do you receive from the Stratton Group Limited?

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A Directors' fees.

Q And how much would that be?

A We are supposed to receive directors' fees of $300 a meeting. However, Stratton is in bankruptcy, and total payments for directors' fees have been $600 a multitude of meetings.

Q And did you own any stock in the Stratton Group Limited?

A Yes.

Q How much stock?

A Roughly 16 or 18,000 shares.

Q And do you own any stock in Sprayregen & Company?

A No, I don't.

Q That's not a corporation?

A Yes, it's a corporation.

Q Do you own any stock?

A Do I own any stock in Sprayregen? No, I do not.

Q Did you own any stock as of April 6, 1973?

A No, I did not.

Q When your counsel asked you on your direct examination what was your business or occupation -- you recall that, that he asked you that?

A Yes.

Q You didn't tell him of your positions, you didn't tell the Court of your positions with the Stratton Group, Sprayregen & Company and Sprayregen Securities, did you?

A He asked if I was employed by these companies. I am not employed by these companies. I am employed by Benjamin Berman.

Q Thank you.

A I do not receive remuneration from these other companies.

Q Were you subpoenaed to testify here today?

A No, I was not.

Q You appeared voluntarily, didn't you?

A That's right.

Q Did you arrive here about 9:30 or before?

A Approximately 9:30.

Q And did you have a meeting in the back of the courtroom with Mr. Fox?

A I had some words with Mr. Fox. I wouldn't consider it a meeting.

Q Did you discuss the April 6, 1973 board of directors meeting with Mr. Fox?

A Yes, I did.

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Q Did you discuss it with Mr. Panish?

A Yes, I did.

Q Now, let me read you from the minutes of the April 6th board of directors meeting:

"The chairman stated that the purpose of the meeting was to consider and act upon an ultimatum issued by Mr. Gavin to the chairman on Tuesday, April 3, 1973, at Mr. Gavin's office in New Rochelle, New York, to the effect that unless the employment of Mr. Donald Moran, Vice-President of Marketing of the company, was terminated by April 6, 1973, Mr. Gavin would immediately resign as a director and president of the company and its subsidiaries."

A Is that a question?

Q Is that your understanding of the ultimatum that was discussed at the meeting?

A Yes.

Q Let me show you the Defendants' Exhibit S in evidence. I ask you to read that paragraph and the remainder of that paragraph.

A "The chairman stated that the purpose " --

Q I ask you to read it to yourself. Read it carefully.

A (Reading)

Q Does that paragraph accord with your understand-

ing of what happened at the meeting when Mr. Gavin was present?

A Yes.

Q Is there anything in that paragraph --

THE COURT: Please don't yell that way, now please.

Q Is there anything in that paragraph where Mr. Gavin stated I resign effective immediately?

A Yes.

Q Where does it say that?

A It said that unless by April 6, 1973 Mr. Moran's employment was terminated, that there was a resignation as a director and president of the company. That's exactly what it says.

Q It says that Mr. Gavin stated that on April 3, doesn't it?

MR. PANISH: Your Honor, may I request that counsel stay back here instead of on top of the witness.

THE COURT: Yes. You have a disconcerting habit of yelling at the witness.

MR. WOLOSKY: I am sorry, your Honor, but this is a --

THE COURT: Don't be carried away by your commitment.

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Doesn't that refer to an earlier talk Mr. Gerald Sprayregen had with Mr. Gavin?

THE WITNESS: Yes, it does.

MR. WOLOSKY: I have no further questions, your Honor.

REDIRECT EXAMINATION

XXXX BY MR. PANISH:

Q You had somse shares in Stratton Limited you say?

A Yes.

Q You had this investment with Mr. Sprayregen for what period of time?

A I had an investment in the Stratton Group, not with Sprayregen.

Q For how long a time?

A I have had this investment for several years.

Q Did your investment show a profit or loss during that period of time?

A In the Stratton Group or Sprayregen & Company?

Q Take each one first, Sprayregen and then Stratton.

A In Sprayregen, Sprayregen & Company cost me approximately a half million dollars. Stratton Group cost me approximately $100,000 in vies of the stock that

the stock is suspended and is tantamount to being worthless.

Q You said Mr. Gavin said something to Mr. Herman Sprayregen after the two, three or four times that Mr. Sprayregen questioned him.

Tell us what was said.

MR. WOLOSKY: I object.

THE COURT: That's going over direct examination. You don't have to have it repeated.

MR. PANISH: I have nothing further, your Honor.

THE COURT: You may step down, sir.

(Witness excused)

D O N A L D S I L V E S T R I , called as a witness on behalf of the defendant, after being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PANISH:

Q Mr. Silvestri, where do you reside, sir?

A 30 Alpine Lane, Chappequa, New York.

Q What is your present occupation?

A I'm a private consultant.

Q Were you ever employed by the defendants Technical Tape and Tuck Industries?

XXXX

A Yes.

Q When did your employment commence?

A 1971, April.

Q What position did you hold?

A Vice-president.

Q In what division?

A Technical Tape and Tuck Industries, both.

Q And briefly what were your duties?

A Mergers, acquisitions, finalcial matters, troubleshooting, some plant activity, more geared toward the financial end of the business however.

Q Now, during the course of your employement did you meet the plaintiff, Mr. Gavin?

A Yes.

Q Do you recall when you met him for the first time?

A Prior to his employment in various recruiting sessions.

Q Now, did you ever speak to the then president, Mr. Chappell about Mr. Gavin?

A Yes.

Q On numerous occasions?

A Yes.

Q Do you know who did the actual hiring of Mr.

Gavin?

A The actual hiring, signing of contracts?

Q Yes.

A That would be Chappell.

Q And are you a member of the board of directors of the defendant?

A Yes.

Q How long have you been a member of the board?

A Since 1971.

Q And are you still a member down to the present date?

A Member of the board?

Q Of the board?

A Yes.

Q Now, did you attend a board meeting on April 25th of 1972?

A Yes.

Q Now, during the course of that meeting do you recall anything about a two and a half percent increment of net income?

A Yes.

Q And you were present at that meeting?

A Yes.

Q Could you tell us to the best of your recollection as to what was done regarding Mr. Gavin and that two and a half percent that is referred to, that we referred to?

A Well, I made a motion --

MR. WOLOSKY: Your Honor, may I have the witness be asked just to relate conversations at the meeting. I don't believe counsel asked for conversations but I believe that's what the witness can testify to, conversations at the meeting.

THE COURT: Let me hear the question -- reframe the question.

Q Did you say anything at that board meeting in respect to Mr. Gavin and two and a half percent?

THE COURT: Was anything said about the two and a half percent at the board meeting, and if so by whom and who said what?

A Something was said at the board meeting by myself. It was a motion to reward the new president of the company with a bonus.

Does that answer your question, your Honor?

THE COURT: If that is what was said. What was done?

THE WITNESS: The board moved to grand a bonus

of two and a half percent based upon certain conditions.

THE COURT: Was there any discussion about those conditions?

THE WITNESS: Yes.

THE COURT: What was discussed?

THE WITNESS: There were to be certain exclusions.

THE COURT: Were the exclusions defined?

THE WITNESS: Yes. Some of them.

THE COURT: What were they?

THE WITNESS: There is a division of the company called Steadley Company that was to be excluded from the formula to be utilized in the computing of bonus. There was to be no consideration for extraordinary gains or extraordinary losses. That could go two ways: In favor of John or against him, depending upon what happened. So excluding that would not create a problem in computing bonus.

Q I show you Plaintiff's Exhibit No. 3 in evidence, the meeting of April 25, 1972, and ask you to look through it for a moment, please.

A (Reading)

Q And to the best of your recollection do those minutes reflect the substance of what occurred at that

meeting at which you were present?

A With regard to the paragraph 4 here discussing the bonus, yes.

Q Well, particularly that paragraph?

A Yes.

Q As well as the rest of the minutes?

A Yes, these seem to be the minutes that I have been shown. It points out in here that in addition there was a limitation, an additional limitation based upon any earnings of any acquired companies.

Q Now, in 1971, 1972 and 1973 when you were employed there, which office did you work out of of the defendant?

A In 1971 and '72 more out of the New Rochelle office.

Q Is that where Mr. Gavin worked out of?

A Yes.

Q Now, to your knowledge did Mr. Gavin every manage or participate in the operations of the Steadley Company?

A No.

Q To your knowledge did Mr. Gavin ever supervise that company?

A As president of Technical Tape pretty obviously

he was a supervisor of any division of the company.

Q But did he actually go there and actively participate in its operations?

A No. To the best of my knowledge. Although he had visited the operation once or twice.

Q And what business is Steadley in?

A They are in the bed spring business.

Q Do you know where they are located?

A Carthage, Missouri.

THE COURT: Bedspread or bed spring?

THE WITNESS: Bed spring.

THE COURT: That's what I thought. I thought you said bedspread.

Q As far as you know did Mr. Gavin have any experience in that type of business?

A No. In all fairness, no one did.

Q Who was the president of Steadley?

A Roger Lawrence.

Q And to your knowledge did he have his own bonus arrangement with Steadley?

A Yes. It's a matter of record.

Q Now, did there come a time at the beginning of April 1973 that you learned something about the Gavin issue and the tendered resignation?

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MR. WOLOSKY: I object.

THE COURT: That's the same as before.

MR. WOLOSKY: I move to strike the answer.

THE COURT: I will disregard it.

Q Did there come a time at the beginning of April 1973 that you received a call from Mr. Gerald Sprayregen?

A Yes.

Q As a result of that call, or I suppose any number of them that you may have had, did you meet with Mr. Gavin?

A Yes.

Q Where did you meet with him?

A We met at a restaurant.

Q Do you recall where that was?

A Carriage Inn or Carriage House up in Larchmont.

Q And when did that take place, do you remember now?

A I think it was the 4th of April of that year.

Q Did you have luncheon with Mr. Gavin that day?

A Yes.

Q Relating to this particular business, and aside from anything else that might have been said, can you tell

us the substance of that conversation, what you said and what he said?

A Yes. Apparently John had --

MR. WOLOSKY: Your Honor, may I ask that the witness be instructed to say what was said by him and what was said by Mr. Gavin and not to editorialize.

THE COURT: When you say editorialize, that doesn't give me evidence.

What was said by you and what was said by he?

THE WITNESS: We had a luncheon meeting to discuss a discussion that was had by John Gavin and Gerald Sprayregen --

MR. WOLOSKY: May I ask that the witness be instructed to say what was said?

THE WITNESS: I am trying to if you will allow me.

MR. WOLOSKY: May the witness be instructed to confine his testimony to what was said by him and what was said by Mr. Gavin.

THE COURT: Proceed.

You had a luncheon conference. Did you discuss this subject?

THE WITNESS: I am trying to comply with the requests. I have never been a witness before; okay?

THE COURT: I will explain to you you may only state what was said by either one of you on that occasion, not what you thought.

Do you have a recollection of what was said?

THE WITNESS: Yes, I have a recollection of what was said. I was asked to have a luncheon meeting with John Gavin to discuss a resignation that was put forth --

MR. WOLOSKY: I object again and move to strike. He is not recounting his conversation.

THE COURT: You are telling us what you were asked. That isn't the conversation. You met Mr. Gavin and you had lunch.

THE WITNESS: Yes.

THE COURT: What did you say to him and what did he say to you?

THE WITNESS: John said to me that he would resign unless the then present vice-president of marketing, Donald Moran, would be fired.

The discussion then went something along the following lines: I tried to dissuade John from making this type of -- or creating this type of action at this time in that I didn't think it was in the company's best interests nor in his best interests to put such a weighty

problem before the company and before the board at that particular time.

We discussed the situation for several hours. Obviously many things were discussed over that period of time. The key problem from my point of view seemed to reside with the inability of both of these key executives to --

MR. WOLOSKY: Your Honor, may I have that volunteered portion stricken.

THE COURT: Sit down for a moment, will you please. I'm assuming this is what he said to him. I did say to you I'm trying this case without a jury and I assume that you give me enough credit for following the law to disregard irrelevant material and hearsay statements.

THE WITNESS: I specifically suggested that no further action on John's part be taken in regard of the Moran situation. John specifically commented that he found he was unable to continue running the company with Moran being present. There was some discussion with regard to a board meeting and specifically recall saying that this matter would have to go before the board. John's comments with regard to his decision was that he discussed the decision with several people and found that although

he might consider for a relatively short period of time not leaving the company, that some short term disposition would have to be made with regard to the then vice-president of marketing, Donald Moran.

Q Did he mention to you whether or not he had a discussion with his wife about that?

MR. WOLOSKY: Objection, your Honor.

THE COURT: Objection sustained.

I must ask you again not to lead the witness.

Does that exhaust your recollection as to what was said?

THE WITNESS: May I have a moment?

THE COURT: Yes.

(Pause)

THE WITNESS: Yes, I think so.

Q Did he tell you to whom, if anyone, he spoke about that before your meeting with him? Did he mention any names?

MR. WOLOSKY: Your Honor, in response to your inquiry the witness just said that his recollection of the conversation was exhausted.

THE COURT: He may try to refresh his recollection.

Q Did he mention that he spoke about that situation

to anyone else?

A Yes, he did mention that he had spoken specifically with his wife in regard of the resignation.

Q Now, after that, after the luncheon meeting did you report the substance of it to Mr. Gerald Sprayregen?

A Yes.

Q Were you in attendance at the April 6, 1973 board meeting?

A No.

Q And you are not presently employed by these defendants; is that right?

A No.

Q But you are still presently a board member?

A Yes.

MR. PANISH: I have no further questions.

CROSS EXAMINATION

XXX

BY MR. WOLOSKY:

Q Mr. Silvestri, I believe you said you were a private consultant?

A That's right.

Q And do you have a firm that is in that business?

A No.

Q Just --

A I'm self-employed.

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Q And do you do any consulting for the Stratton Group Limited?

A From time to time,yes.

Q And do you do any consulting for Sprayregen Securities?

A No.

Q Do you do any consulting for Sprayregen & Company?

A No.

Q In the past year have you done any consulting for the Stratton Group Limited?

A Yes.

Q And how much renumeration have you received in the past year from the Stratton Group Limited?

A In the past year? I would say approximately $1500.

Q Do you presently own any stock in the Stratton Group Limited?

A No.

Q Do you own any stock in Sprayregen & Company?

A No. You can't own stock in Sprayregen & Company. There is no such stock.

Q Do you own any stock in Sprayregen Securities?

A No. You can't do that either. You can own

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stock in Technical Tape or you can own stock in Stratton but you can't hold the stock of a subsidiary company.

Q Do you have any direct or indirect financial interest in Sprayregen & Company?

A No.

Q Do you do any consulting for any other of Mr. Sprayregen's businesses or interests?

A No.

Q Now, in April of 1973 were you employed by any company other than the defendants in this action?

A No.

Q Did you have any position whatsoever with the Stratton Group?

A Position?

Q Yes.

Q No.

Q Were you a director?

A Director, yes.

Q Were you also a director of Sprayregen Securities?

A No.

Q Were you a director of Sprayregen & Company?

A No.

Q Are you presently a director of the Stratton

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Group?

A Yes.

Q And apart from your consulting fees do you receive directors' fees from the Stratton Group?

A Yes.

Q Incidentally, Mr. Silvestri, are you appearing today pursuant to a subpoena served on you?

A No.

Q You are appearing voluntarily?

A Yes.

Q Now, I show you Plaintiff's Exhibit 3 and ask you if there is anything in that exhibit that states that Steadley is to be excluded from the plaintiff's two and a half percent incentive plan?

A Specifically?

Q Yes.

A No.

Q Is there anything in those minutes that state specifically that extraordinary gains and losses are to be excluded?

A No.

Q You attended that board meeting on April 25th, did you not?

A That's this specific board meeting when we

were discussing the bonus?

Q Yes.

A Yes.

Q Do you have some doubt about that?

A No.

Q And I take it that at sometime --

A I thought for the moment you had said '73 earlier.

Q No, I said '72, April 25, 1972.

A Okay, I thought you had said '73.

Q I take it at sometime after that meeting you received copies of the minutes.

A I don't recall but I assume I did. Minutes were normally distributed shortly after the meeting.

Q I take it that you reviewed those minutes that you have in front of you today.

A Good assumption.

Q And after reviewing those minutes did you ever suggest to anyone that they be amended to specifically include as exclusions the Steadley Company and extraordinary gains and losses?

A Well, the Steadley Company --

Q Yes or no.

A Just yes or no?

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Q Yes.

A Okay. No, I don't recall.

Q Now, you said you had a meeting at the Carriage House in New Rochelle with Mr. Gavin.

Did you make any notes or memoranda of that meeting?

A No.

Q And did you get here about 9:30 this morning or a little before that?

A Yes.

Q Did you have a discussion with Mr. Fox in the back of the courtroom?

A Yes.

Q Did you also have a discussion with Mr. Panish?

A Yes.

Q Did you discuss that meeting you had with Mr. Gavin on April 4, 1973?

A Among other things, yes.

Q I believe on your direct testimony with respect to that meeting, you said that Mr. Gavin said he would consider not resigning for a short period of time; is that correct?

A Yes.

Q You said that at the meeting that you had with

him.

A That's right.

MR. WOLOSKY: I have no further questions.

MR. PANISH: I have no questions, your Honor.

THE COURT: You may be excused.

(Witness excused)

THE COURT: Please call your next witness.

MR. PANISH: Mr. George Wetzell, please.

G E O R G E W E T Z E L L , called as a witness on behalf of the defendants, after being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PANISH:

Q Mr. Wetzell, where do you reside?

A I reside in Darien, Connecticut.

Q Are you employed by the defendants, Tuck Industries and Technical Tape?

A Yes, I am.

Q Approximately how long have you been employed by them?

A Approximately fifteen years.

Q On or about April 5, 1971, what was your position?

A In April '71 I was a regional manager, the industrial regional manager for the midwest in Tuck Industries.

Q Did there come a time when your position changed?

A Yes.

Q Give us the month and year, please.

A In and around March or April of 1972 I was promoted to the national sales manager's job, industrial, and moved to the new New Rochelle headquarters.

Q For how long did you remain there?

A In that position approximately two years until March of this last year of 1974.

Q And what is your position now?

A Vice-President of Consumer Sales Division, Consumer Products Division.

Q During your employment with the defendants did you have occasion to speak to the plaintiff, Mr. Gavin?

A Certainly. Many times.

Q Did you discuss with him any customers in what is known as the TOP distributors?

A Yes, many times.

Q What is meant by TOP distributors?

A Well, at the time I came on board as national

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sales manager we embarked on a new marketing program and the program in essence stipulated a new philosophy. One of them was that we would appoint franchise distributors. They were called TOP distributors, which stood for Tuck Opportunity Program distributors. We targeted in on the larger distributors throughout the United States. Basically, that was a new program that we embarked on at that time.

Q Did Mr. Gavin -- was he aware of this program?

A Yes, very much so.

Q And did you have occasion to discuss with him one of the customers, W. Evans & Company?

A Let me say that we discussed many big distributors. During our discussions from time to time, since John is very sales oriented, we discussed W. Evans along with two or three other key customers in that general vicinity. If you want me to name those I can.

Q Where is the vicinity?

A Well, the vicinity -- see, my basic background came out of that midwest area. The vicinity I am talking about, W. Evans is in Kansas City. John and I made a trip to Omaha, which is Carlson Stapler. We discussed the big distributors in that area which he had prior knowledge of from his prior association with a tape company.

MR. WOLOSKY: May the witness be directed

that the witness answer the questions of counsel?

THE COURT: He said he had prior knowledge of these people before he went with Technical Tape. Let's get along with this.

Q You had discussions about other big distributors in addition to W. Evans?

A Yes.

Q Do you recall when those discussions with Mr. Gavin took place?

A To the best of my recollection John and I took a trip one day out to Omaha. That goes back in the early parts of the TOP program, back in April of '72.

In making the call out in that general area again, being close to Kansas City, we discussed the potentials in other areas. One was W. Evans in Kansas City.

THE COURT: Perfectly natural thing to do?

THE WITNESS: Certainly.

Q Do you have any documents now in your possession concerning W. Evans?

A The only one I have, and it is a TOP account list, and I'm sure John is familiar with it. It's a confidential report that we issued to John, to Don Moran and to myself and two or three of the customer service

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girls that lists the TOP accounts.

In this listing obviously under Missouri is W. Evans.

Q What page is that on?

A Well, it's not on a page. I'll look under the state. Here's Missouri, the W. Evans Company. This was issued in January of '73.

We would from time to time issue and up-to-date report on what we call our TOP accounts, which, again, John being sales oriented was very much involved with.

Q Now, do you know whether or not a time came when the W. Evans Company ceased to be a TOP distributor?

A I don't have the exact time because, as I mentioned in, in March of this last year I took over the consumer division. If I can recollect, we dropped them as a TOP account probably around April or May when Mr. Sprayregen made a trip out there with the new national sales manager for the industrial division.

THE COURT: Of what year, April or May?

THE WITNESS: '74.

MR. PANISH: I have no further questions.

CROSS EXAMINATION

XXXX BY MR. WOLOSKY:

Q Mr. Wetzell, did I understand you correctly

that Technical Tape dropped W. Evans as a distributor?

A To my understanding, yes.

MR. WOLOSKY: I have no further questions.

MR. PANISH: No questions, your Honor.

THE COURT: You may step down.

(Witness excused)

THE COURT: Call the next witness, please.

MR. PANISH: Your Honor, the defendants at this time rest.

THE COURT: Any rebuttal?

MR. WOLOSKY: I have no rebuttal.

MR. PANISH: May I make a motion, your Honor, please?

THE COURT: Yes.

MR. PANISH: I want to state on the record, your Honor, that we did have some difficulty in trying to obtain some witnesses from the midwest in respect to the damage aspect of the defendants counterclaim, and not being able to come forward at this time the defendants respectfully request the Court for permission to withdraw that counterclaim.

MR. WOLOSKY: Your Honor, I have no objection to having defendants withdraw that counterclaim, except that I make a request here, which I would have made in any

event, that this case be protracted solely because of the assertion of the counterclaims by the defendants in this action.

Mr. Gavin has gone through considerable expense in depositions and motions and preparation for this case because of the counterclaims asserted.

At the time there was not one --

THE COURT: Mr. Wolosky, there is a motion to withdraw the counterclaim. Are you objecting?

MR. WOLOSKY: I am not objecting.

THE COURT: Motion is granted.

MR. PANISH: On all the evidence, your Honor, the defendants at this time respectfully move to dismiss the plaintiff's complaint on the ground that on all the evidence adduced the defendants preponderated their proof in respect to certain of the crucial issues.

I think it would be farfetched to assume, your Honor, that a series of witnesses came into this Court, including Mr. Herman Sprayregen, Gerald Sprayregen, all of the members of the board, Howard Weitz, Dick Bernard, Don Silvestri, and would not be telling exactly what happened during that board meeting.

THE COURT: Mr. Panish, you are making a motion, I take it, for a directed verdict.

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MR. PANISH: In effect, your Honor.

THE COURT: The only issue then is whether there is an issue of fact to be decided by the trier of the facts.

As far as your motion is concerned that is denied.

Now, if you want to sum up I'll hear each side and then you can make whatever argument you desire.

We will take a short recess. Look at your notes and then you may sum up.

THE COURT: I'm simply deciding there is an issue of fact to be decided by the trier of the facts.

(Recess)

THE COURT: All right, Mr. Panish, you may sum up.

MR. PANISH: Yes, your Honor.

Your Honor, at this time I have a few brief remarks to me. Of course, as I would tell the jury, I certainly don't intend if I refer to anything to mislead the Court. Of course the record prevails at all times.

In substance, your Honor, the plaintiff, Mr. Gavin, sues in respect to the written employment agreement dated April 5, 1971, Plaintiff's Exhibit 1 in evidence.

Now, insofar as this trial is concerned I think there are two main and crucial paragraphs. The first one is No. 2 regarding the severance pay in the sum of $35,000 per annum. The next one would be paragraph No. 6.

Tersely, and in quotes it states,

"No modification or termination of this agreement shall be valid unless in writing and signed by Gavin and the company."

Now, that sentence is set forth in the disjunctive. In other words, you could take it either/or, one or the other. So that if you omit the latter part as to terminate and agreed, no modification of this agreement

shall be valid unless in writing and signed by Gavin and the company.

Leaving the modification and taking it the other way it says no termination of disagreement shall be valid unless in writing and signed by Gavin and the company.

Now, what happened in the course of the dealings between these parties and the plaintiff's employment? I have set forth, your Honor, approximately a dozen or so different modifications that did take place and that were testified to.

The modifications that did take place, your Honor, without a writing signed by both parties as set forth in paragraph 6 of the agreement is his increase in salary from $35,000 to $55,000 per annum. The matter in relation to the two and a half percent of net income with certain limitations and exclusions, which took place at a board meeting. The contract specifically stating that his compensation shall be paid monthly. Instead he admitted it was paid weekly throughout the two-year period. He received the medical or surgical-medical disability for himself and his family which is not in the written contract. He received one $8,000 bonus. He received another $2,000 bonus, he was elevated to president, he was made a

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member of the board of directors, made a member of the executive board. He received two separate stock options, one for 30,000 shares at $3.50 and the other for 1,000 shares at $3.50. He received the use of an automobile plus expenses. Those are the ones I have in mind at the moment, your Honor.

Now, in respect of the April '73 matter concerning the so-called ultimatum.

Now, what actually occurred? We only know what occurred through what the witnesses tell us. Initially there was a conversation between the plaintiff and Mr. Gerald Spraycegen. He wanted time to think it over. Mr. Silvestri then had a conversation with him and testified today as to what happened in the Larchmont Inn. The board meeting was held that Friday, April 6th.

We had five members of the board that were present who all testified today. I think it would be farfetched to assume, your Honor, especially the person that took the minutes, Mr. Howard Weitz, who is not an employee of these defendants, who was subpoenaed by me to come to court to testify as to what occurred, and he stated that he transcribed accurately just what transpired at that meeting. He, together with all the other board members, described precisely the situation between the

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plaintiff and these defendant companies.

In effect, your Honor, there was no wrongful discharge. The plaintiff is disentitled to any damages for that. In view of the fact that the defendants did not terminate his employment, he is not entitled to the $35,000 referred to in paragraph 2 of the agreement.

Now, in respect to the two and a half percent increment, I think if we take the sequence of events we will see that even before this lawsuit it was spelled out.

In the April 25, 1972 board meeting the two and a half percent is referred to and it specifically sets forth the exclusions of special items, subject to limitations and to certain other exclusions as may later be determined.

And prior to the institution of this lawsuit, your Honor, if I may, one of the exhibits, I don't have the number with me at this time, the proxy statement of June 28, 1972, certainly before anyone would have intended any litigation here, it sets forth to the public through a document that was filed with the SEC, of which the Court can take judicial notice that there is such filing, that Mr. Gavin is entitled to receive two and a half percent of the increment subject to certain exclusions.

It further states in the same document, your

Honor, and makes mention of Mr. Lawrence in regard to the Steadley Company, that in addition to his compensation of $38,000 per year he gets a certain percentage of net income.

I think it would be farfetched to assume, your Honor, that these defendants would at one and the same time pay almost a similar type of increment to two different presidents in an overlapping situation where the net income of both were included. I think it was understood and there was testimony to the effect that Mr. Gavin was told and knew that the board members subsequently, and even though it may have been as late as August 1974, did pass such a resolution.

In view of that situation and in respect to Mr. Degnan's testimony that Steadley should be excluded, we come down to a zero figure in respect to the plaintiff's third claim.

In passing I want to say that even though your Honor felt it was unimportant during the trial, but if I may at this time, your Honor, that the plaintiff did have three different versions. In his third claim he said he is entitled to an excess of $12,500. He was in possession of the annual reports at that time because they were already published. In his findings of fact or

rather pre-trial memorandum submitted to this Court, your Honor, if I may, on page 4, and to me that is almost like a representation as to what he claims his damages to be, he states in subparagraph 10, which is the second paragraph on that page, that the two and a half percent thereon is $1,909.28.

Now, during the testimony he came up with a figure of about $8,900, where your Honor pointed out when you take the two figures of '72 and '71 you get the difference, you multiply by two and a half percent, arithmetically that would be so. Notwithstanding that, we still have three different versions.

Of course, the plaintiff must preponderate in his proof as to credibility and as to his burden.

Now, what was said in mitigation? I think we have here, your Honor, a sophistocated and a knowledgeable plaintiff. When I examined him in his deposition, and I read it into the record, and I would like to read the same question and answer again, your Honor, which was on page 188:

"Q After April 6, 1973, to April of 1974, did you have any other employment other than with Encore Tape, the business you were operating?

"A No."

Now, he knew what I meant. He knew I meant did he make any other money as a consultant, as an employee, or from any other source. He had his attorney present. His answer was no. He never said to me that he received any monies from Nepi, he never said to me he received any monies from W.R. Grace. He only mentioned Spec Tape and Manco.

When I was admonished by the Court that maybe discovery was not completed, frankly, your Honor, it was because of that answer.

In respect to the April 9, 1973 conversation between the plaintiff and Mr. Gerald Sprayregen at the office where he had two checks that passed, one was for expenses, and of course your Honor is right, he is entitled to get his expenses back. There was still another check, the one for $1,536 -- $538.40, Defendants' Exhibit G in evidence.

There was a conversation in respect to that. The plaintiff's version was that was vacation pay. There is also other testimony that the plaintiff never got a vacation or was not entitled to vacation pay. The defendants' version was, your Honor, that this was termination pay; that that's the reason why they took all the expenses from the preceding months that very minute, that very morning,

added it up, gave him two separate checks, one for reimbursement and one which was considered to be termination by Mr. Gerald Sprayregen.

Now, why did I have Mr. Wetzell here as a witness this morning, your Honor? The reason was because Mr. Gavin stated and testified that he never knew W. Evans to be a TOP distributor.

Now, in order to attack his credibility frankly I had Mr. Wetzell here to show that he knew of W. Evans. He was in the midwest, he knew of the report, and of course the old legal saying that where a person testifies falsely once he may testify falsely throughout, not only in that instance but in other instances.

I therefore respectfully submit that the plaintiff is disentitled to any damages in this case.

MR. WOLOSKY: The plaintiff would urge, your Honor, that he is entitled to a judgment as a matter of law. His contract clearly and unequivocally provides that there can be no termination of his contract unless it is in writing. The defendants produced no writing.

Moreover, we have shown that there was no waiver of that provision. Defendants have attempted to show by various numbers of alleged modifications that that

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provision was waived. We would first urge that even if there were oral modifications there was no waiver of the oral termination provision because both sections are and should be read separately. In fact they are treated separately in the General Obligations Law of the State of New York. That is Section 15301, Subparagraphs 1 and 2.

We would also urge that there was no waiver in any event because there was no oral modification of the plaintiff's agreement. Section 15301 relates to -- Subparagraph 1, relates to oral modifications and only bars executory oral modifications, and each of the modifications urged by plaintiff were in fact executed and fully carried out and therefore does not constitute an oral modification in the sense that defendants urge.

Moreover, that same section of the General Obligation Laws provides that even an executory modification is effective if it is signed by the party against whom enforcement of the change is sought. Each of the oral modifications urged by the defendant were clearly and convincingly shown to have been evidenced by a writing.

THE COURT: That isn't what the contract says, by a writing, it says signed by the parties in writing.

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MR. WOLOSKY: Your Honor, we would urge that that provision of the contract must be read in connection with the General Obligation Law of the State of New York.

THE COURT: Is there any question that there was a waiver with respect to the modification provision, separating it from the termination provision?

MR. WOLOSKY: Your Honor, we would urge that there was no waiver by the plaintiff. Maybe by the defendants but not by the plaintiff.

THE COURT: All right, go ahead.

MR. WOLOSKY: In any event, we would urge that both the oral modification and the oral termination should be read separately. There certainly was no waiver of the oral termination provision.

We would urge also that there was not in fact an oral resignation. The testimony adduced at the trial through Mr. Gavin was that Mr. Gavin unequivocally stated that he never resigned his position with the defendant, and there was no testimony from the defendants that he ever did in fact resign. The witnesses took the stand and they clearly said, when asked was there a resignation, and they said, no, the minutes do not reflect a resignation in fact.

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At best you take the defendants' testimony at face value and that is that sometime earlier in the week Mr. Gavin had said he would resign if Moran was not fired.

Now, certainly we would urge that even if that statement attributed to Mr. Gavin is true, that a threat to resign is not in fact a resignation. And when the board voted to accept it, Mr. Gavin's resignation, there was in fact no resignation before the board.

I would also like to comment upon the witnesses who testified as to the alleged ultimatum. Each one, each witness that came in here and stated that Mr. Gavin had issued an ultimatum earlier in the week was not only a director of Technical Tape but also otherwise associated with Mr. Sprayregen, the chairman of the board and his other business interests.

And in fact these witnesses could not, I repeat, could not, be consistent on what in fact the ultimatum was between themselves and as compared to the minutes of the meeting; they could not in fact be consistent on other material events that happened during that week and during the course of that meeting.

In fact, Mr. Silvestri conceded that earlier in the week Mr. Gavin had stated that he would consider

not resigning. That was after the ultimatum.

Now, in contrast to the testimony of the interested witnesses Mr. Gavin has been, we believe, a straightforward witness and has testified fully to his best rememberance of the facts. I think Mr. Gavin fully explained that when he was asked about employment on his deposition he did not construe that to mean his consulting.

In any event, we have at this trial fully made available all evidence regarding his activities after he was terminated by the defendant.

In this regard we would urge that there was never a written resignation, there was no oral resignation, and the action to the board constituted a termination of Mr. Gavin.

In this regard, your Honor, I would like to make just one other point on the question of liability. If in fact Mr. Gavin as president of the company stated that he would fire Moran or he stated that he wanted to fire Moran and the board of directors voted that he as president and chief operating officer could not fire Moran, we would urge that that action was in fact a reduction in Mr. Gavin's rank and in fact a termination of his employment contract under the case of Rudman against

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Cowell

Publications, which appears at 30 New York 2nd Page 1.

We would therefore urge that we are entitled to judgment on the question of liability.

On the question of damages we would urge that the plaintiff is entitled to recover for breach of the employment contract $50,000 plus $8,901 on the two and a half percent incentive bonus, and we would in that regard state that the amount he is entitled to on the bonus should be determined by the proof and not what is in the pleadings or in the pre-trial memorandum.

I would like to note that no exclusions were ever made until August of '74, which was after this bonus would have accured --

THE COURT: Yes, but the 1972 resolution specifically refers to exclusions to be determined by the board. This wasn't pulled out of thin air.

MR. WOLOSKY: It wasn't pulled out of thin air but I don't think they could have passed or made exclusions after the bonus would have accrued. If he became entitled to $8,901 --

THE COURT: He wasn't entitled to that. You are misreading the resolution. You have to be frank. That resolution specifically refers to exclusions to be

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determined by the board. They were not defined at the time.

THE COURT: In any event, your Honor, we would urge that the August 22, 1974 resolutions were not made in good faith and they were only made after the institution of this litigation and we would urge for the purposes of this litigation.

Your Honor, we would urge that plaintiff is entitled to $50,000 for breach of his employment contract, $8,901 on the incentive plan, and we would urge that his net incomefrom 1973 as reported in his tax returns on his consulting and Encore Tape --

THE COURT: What is that net income?

MR. WOLOSKY: $5,061.

THE COURT: What is the net income from the consulting -- from all sources and what was the amount of the loss? There are other deductions in that tax return.

MR. WOLOSKY: Your Honor, I will get his tax return.

Your Honor, on consulting income for the year 1973 there was a net amount after expenses of $19,945. We would ask that there be subtracted from that his loss of $14,884 on Encore Tape and Label, which would

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come out to the net figure of $5,061.

In 1974, although the witness stated that he received approximately $3,333 from Nepi, that he also stated that his losses from Encore Tape and Label were running approximately at the same level, which would have cancelled out that gain from Nepi.

THE COURT: Well, that was an approximation and I didn't regard it as substantial evidence at all.

What else do you have?

MR. WOLOSKY: Your Honor, at this point we would also ask for an aware of counsel fees with respect to the plaintiff's --

THE COURT: Under what section of the law are you asking for counsel fees?

MR. WOLOSKY: Under Rule 11 of the Federal Rules of Civil Procedure and under the case of Stratton Group Limited against Chelsea National Bank, 54 FRD 227 decided by Judge Bonsal of this court.

In that case counsel fees were awarded against the plaintiff Stratton Group Limited for making a complaint and bringing an action which the Court determined to be in bad faith.

THE COURT: What section do you say that you are asking for counsel fees?

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MR. WOLOSKY: Rule 11, which requires the pleadings be asserted in good faith.

THE COURT: Where does it state that counsel fees may be awarded?

MR. WOLOSKY: I believe it says that appropriate sanctions may be --

THE COURT: It says the attorney may be subjected to disciplinary action.

MR. WOLOSKY: Your Honor, we believe the case just cited stands for that proposition.

THE COURT: Anything else?

MR. WOLOSKY: We believe that on our second claim that plaintiff is entitled to $35,000 severance pay.

THE COURT: On what theory? You have just asked the Court to award you the full salary for the year that remained.

Now, if he stayed in employment the full year and plaintiff paid him the full salary, are you saying that you are still entitled to termination at the end?

MR. WOLOSKY: No, your Honor.

THE COURT: Why are you entitled to that twice? I asked you that the other day.

MR. WOLOSKY: We are not claiming we are

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entitled to it twice. What I am stating, your Honor, is that the termination pay would not be subject to mitigation since it was entitled severance pay. We would say that we are entitled to the greater amount between the breach of contract of contract claim and the severance pay claim on the theory that the defendants ought not receive the benefit of a lower award of damages resulting from this wrongful discharge.

THE COURT: That is an alternative claim. Your alternative claim is that if the net damages under your first claim is below $35,000, then you ought to get the termination rate.

MR. WOLOSKY: That's what I am saying.

THE COURT: Whichever is the higher figure.

MR. WOLOSKY: That's exactly it.

THE COURT: I thought you were arguing you were entitled to both, which is what you argued at the beginning of the trial, and I didn't understand it.

THE COURT: I will take a short recess. I want to consider what you have said and go over some notes.

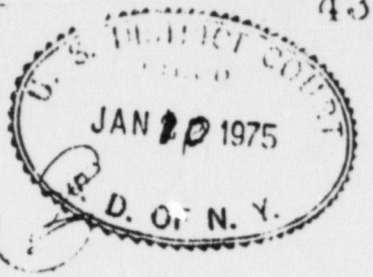
(Recess)

THE COURT: I am going to dictate my notes to the court reporter now from some memos I have here but it is not to be released until I get a chance to go

over it and edit and revise it but I think I will give the disposition now.

desk 450a Copy # 41707

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOHN A. CAVIN,

Plaintiff,

-against-

TECHNICAL TAPE, INC. and TUCK INDUSTRIES, INC.,

Defendants.

73 Civil 2120

OPINION
FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Judge Weinfeld 1/8/75

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New York, New York

Attorneys for Defendants

SAM PANISH, ESQ.
Of Counsel

EDWARD WEINFELD, D.J. (Orally):

This action in its early stages was simple enough. Plaintiff, John A. Gavin, sued the defendants Technical Tape, Inc. and its affiliate Tuck Industries, Inc. (hereafter "defendants"), upon a written agreement of employment for a three-year period. The agreement provided for compensation of $35,000 per annum. However, during the course of plaintiff's employment his salary was increased to $50,000.

Plaintiff alleges that he duly performed his services until he was wrongfully discharged by the defendants on April 6, 1973. He seeks to recover $48,082.19 unpaid salary for the duration of the contract.

Under a second claim, plaintiff seeks to recover $35,000, based upon a severance pay provision contained in the agreement rather than at the salary rate referred to under the first claim.

Under a third claim, he seeks damages under a two and one-half percent incentive bonus provision for the year 1972.

Under the fourth claim, a declaratory judgment is sought for a bonus for the fiscal year 1973.

In its initial answer the defendants denied the wrongful discharge and the other material allegations of the complaint. Thus the issues under the pleadings at that stage were comparatively simple. Essentially, the issue was had the defendant in breach of the employment contract wrongfully terminated plaintiff's employment?

Plaintiff, however, moved for summary judgment, which, apart from opposition thereto, triggered a motion by the defendant for leave to serve an amended answer containing seventeen affirmative defenses and seven counterclaims, the number of which led this court at that time to question the good faith with which these numerous defenses and counterclaims were advanced. But in view of the liberal Rule with respect to amended pleadings, the court granted the motion to amend to the extent of allowing the amended answer to include the affirmative defenses of estoppel and waiver based upon certain conduct and changes in the agreement, and also permitted a counterclaim.

The resulting counterclaim contains a potpourri of allegations attributing to the plaintiff various acts of misconduct and incompetence during the term of his employment by defendants, such as entering into contracts and arrangements in bad faith under terms detrimental to defendants, and allegations that plaintiff, after leaving defendants, engaged in unfair competition with them by using their trade secrets and attempting to divert their customers.

In their counterclaim, defendants seek recovery of $265,652 and, in addition, $300,000 in punitive damages.

Now that the trial is over, the evidence in, and the court has been afforded the opportunity to observe the demeanor of witnesses, I must say that not only have the defendants failed to sustain their burden of proof as to their counterclaim, but it is clear that these claims are so lacking in evidentiary support that the court's questioning the defendants' good faith when they first advanced the claims on their motion for leave to serve the amended pleading was justified. Indeed, no other comment need be made than to note defendant's withdrawal of the counterclaim at the close

of the entire case.

Thus the case is now in the posture of its original and simple state, a claim of breach of an employment contract.

Has the plaintiff sustained his burden of proof? The contract, as already noted, was in writing and entered into between plaintiff and defendant on April 5, 1971 for a three-year period beginning April 5, 1971 and ending April 5, 1974. It contained a provision to the effect that no modification or termination of the agreement shall be valid unless in writing and signed by plaintiff and defendants.

Following plaintiff's entry upon his duties, there were modifications in the contract without specific writings signed by both parties. Plaintiff's services were terminated at the end of two years on April 6, 1973, without a specific writing signed by the parties.

Under the agreement, plaintiff was employed as defendant's senior vice president and chief operating officer at a salary of $35,000 payable in equal monthly

installments at the end of each month. On April 25, 1972, by resolution of the Board of Directors of defendant Technical Tape, Inc., plaintiff's salary was increased from $35,000 to $50,000, retroactive to April 4, 1972. At the same meeting, the Board voted that plaintiff was to receive a bonus of two and one-half percent of the increment in net income from operations for the fiscal year 1972 and 1973 over the net income from operations for the fiscal year 1971, subject to certain limitations and exclusions to be determined by the Board of Directors.

At the same meeting, plaintiff was elected president of Technical Tape, Inc., made a member of its Board of Directors, and elected a member of a three-man executive committee that functioned between meetings of the Board of Directors. Other events occurred that were not provided for in the original written employment agreement. Plaintiff was granted an option to purchase common stock of Technical Tape, Inc. Also he received a total bonus of $10,000 in the year 1972, and defendants paid for medical, surgical, major medical and disability insurance for plaintiff and his family.

It is a fair inference that these additional items were granted by defendants because they were fully satisfied with plaintiff's services.

With respect to these various matters, the parties did not specifically assent thereto in writing as required by the employment contract's provision for modifications. Accordingly, the defendants contend that with respect thereto the parties waived the provision. These matters were fully executed and reflected benefits to each of the parties.

The court finds that the parties did waive the provision that any modification had to be assented to in writing by both parties. The defendants, however, further claim that by their conduct and the waiver of the modification clause, the parties also manifested a waiver of the requirement that no termination was valid unless in writing, signed by both parties. Based thereon, the defendants argue that plaintiff offered his resignation orally which was accepted at a Board meeting. The plaintiff denies he tendered his resignation.

It would be unusual, if not unrealistic, to have

expected the parties in the instance of an increase in salary, a bonus payment, an incentive bonus provision or the other items, benefits to both the respective parties, to have signed a writing manifesting those modifications. However, upon all the evidence and under the circumstances here presented, I do not find that the parties also intended to waive the provision against oral termination of the agreement.

Moreover, based upon all the evidence, I find that even if there were a waiver of the written termination provision, the plaintiff did not orally resign or offer his resignation to the defendants.

The final events in the relationship of the parties concerned a controversy involving the continued employment of one Moran, whom plaintiff intended to discharge. Plaintiff and Gerald Sprayregen, Chairman of the Board of Technical Tape, Inc., had rather strong differences on this subject, as a result of which a special Board meeting was called by Sprayregen, at which he apparently dominated the other members of the Board. The evidence leaves no doubt that he became much excited and enraged

at this meeting. Sprayregen said the meeting had been called because plaintiff had issued an ultimatum that if Moran were not fired he would resign. Plaintiff at the meeting denied he had issued an ultimatum or that he had offered to resign.

While prior to the meeting at a conference with Sprayregen the plaintiff may have used language that suggested the ultimatum that he would resign if Moran were not fired, he did not in fact tender his resignation or resign either at the Board meeting or at any time prior thereto. An ultimatum of what one would do is different from what one actually does.

Plaintiff, as a member of the Board of Directors, were present when the resolution was proposed and passed to continue Moran as an employee, with plaintiff casting the only negative vote. It is significant that if plaintiff had tendered his resignation or in fact actually resigned, no resolution was proposed or passed by the Board accepting the resignation while he was still present at the Board meeting. This is all the more significant since one of the Board members was

counsel to the corporation and familiar with the contract which contained the provision requiring a writing signed by both parties for its termination. Only several hours later, after there had been much discussion between Sprayregen and plaintiff, did the other members of the Board assemble in plaintiff's absence and pass a resolution in which the Board purported to accept a resignation that had not been offered by plaintiff.

While it is acknowledged that at the Board meeting plaintiff repeatedly denied that he had offered to resign or that he had issued an ultimatum, although he later admitted that before the meeting he had issued one, the minutes make no mention of this. Plaintiff reported to his office the next business day following the meeting, prepared to carry on his duties, but was prevented from doing so by Gerald Sprayregen, who earlier that morning had removed plaintiff's belongings from his office.

In short, I find that the controversy about Moran was used as a pretext by the defendants to terminate plaintiff's service without justification and that plain-

tiff is entitled to damages as follows: upon his first claim, the sum of $48,082.19. Since he is awarded damages based upon his salary of $50,000 for the balance of the contract period, plaintiff is not entitled to severance pay as alleged under his second claim. As to a bonus for the year 1972 based on an increase in profits over 1971, as alleged in the third claim, I find that plaintiff has failed to sustain his burden of proof as to this item. Under the resolution establishing the bonus, the Board of Directors had power to exclude items in calculating the net profit. While it is true that the Board did not take action on this matter until August 1974, long after plaintiff commenced this suit, I am satisfied that it was justified in excluding the profit of the Steadley Company, which was engaged in a business different from the tape business for which plaintiff's services were principally rendered. Upon this exclusion it appears there was no increase in profits in the year 1971, and therefore no bonus payment is due plaintiff for that period.

As to the fourth claim, which seeks a declaratory judgment as to a bonus for the year 1973, there is no

evidence to sustain plaintiff's claim and, accordingly, it is dismissed.

Finally, as against the award in favor of the plaintiff, defendants are entitled to credit for such net sums as plaintiff earned from the date of his discharge to the end of the contract period. I find that plaintiff had income from employment and consultative activities from April 6, 1973 for the balance of 1973 of $19,945, and from January 1 to April 5, 1974 of $3,166, a total of $23,111.

Further, I find that the plaintiff incurred losses in a tape business he engaged in following his discharge in a reasonable and good faith effort to generate income. The losses amounted to $14,884, which, deducted from the gross income of $23,111, leaves net earnings of $8,227 to be deducted from the $48,082.19. Plaintiff is therefore entitled to a net recovery of $39,855.19, to which there is to be added interest from the date of discharge, April 6, 1973.

Costs may be taxed in accordance with the Rules.

The foregoing shall constitute the Court's Findings of Fact and Conclusions of Law.

Dated: New York, N.Y.
January 8, 1975

EDWARD WEINFELD
United States District Judge

I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability from my (our) stenographic notes at this proceeding.

Raymond Deitmore
Official Court Reporter
U.S. District Court

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED
JANUARY 10, 1975

(Printed herein at p.450a)

as to whether or not such ultimatum had been issued. Mr. Herman Spravregen

ORDER TO SHOW CAUSE FILED FEBRUARY 7, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JOHN A. GAVIN,

Plaintiff,

- against -

TECHNICAL TAPE, INC., et ano.,

Defendants.

----------x

73 Civ. 2120 (EW)

ORDER TO SHOW CAUSE
with A STAY

Upon the annexed affidavit of SAM PANISH, sworn to the 16th day of January, 1975, upon the opinion, findings of fact and conclusions of law made by United States District Judge EDWARD WEINFELD, entered on January 10, 1975, upon the Judge's Trial Minutes and upon the proceedings had herein,

Let the plaintiff or his attorneys show cause before this Court in Room 128 of the United States Courthouse, 40 Centre Street, New York, N.Y. at 2:15 P.M. on January 28th, 1975 or as soon thereafter as counsel can be heard why an order should not be made and entered herein as follows:

1. To amend the opinion, findings of fact and conclusions of law entered on January 10, 1975 and any judgment entered pursuant thereto, to open the judgment entered, if any, and amend the findings of fact and conclusions of law or make new findings and

reported that M[illegible]in had requested that he receive from the C[illegible]

conclusions, to amend and direct the entry of a new judgment and for a new trial, pursuant to Rules 52 and 59 of Federal Rules of Civil Procedure.

2. To stay all proceedings in enforcement of the judgment and executions thereon on behalf of the plaintiff, his attorneys, agents and any United States Marshal from enforcing the said judgment, pending the disposition of this motion, pursuant to Rule 62 of Federal Rules of Civil Procedure.

3. For such other and further relief as to this Court may seem just and proper.

And in the meantime, until a hearing and determination of this motion, all proceedings on the part of the plaintiff, his attorneys, agents and any United States Marshal be and the same hereby are stayed.

Sufficient reason appearing therefor, ~~let~~ service of a copy of this order and the accompanying affidavit, upon PARKER, CHAPIN & FLATTAU, attorneys for the plaintiff, on or before January 20, 1975 shall be deemed sufficient service thereof.

DATED: New York, N.Y.
January 20, 1975

/s/
EDWARD WEINFELD, U.S.D.J.

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW ANNEXED TO ORDER TO SHOW CAUSE

(Printed herein at p.450)

AFFIDAVIT OF SAM PANISH IN SUPPORT OF MOTION FILED FEBRUARY 7, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

JOHN A. GAVIN,

Plaintiff,

- against -

TECHNICAL TAPE, INC., et ano.,

Defendants.

----------x

73 Civ. 2120 (EW)

AFFIDAVIT

STATE OF NEW YORK)
)SS.:
COUNTY OF NEW YORK)

SAM PANISH, being duly sworn, deposes and says:

I am an attorney and counsel to SMITH, PANISH & GETLAN, which firm is of counsel to GERALD A. FOX, the attorney of record for the defendants in the above entitled action. This affidavit is being respectfully submitted on behalf of the application of the defendants to amend the opinion, findings of fact and conclusions of law of this Court, entered on January 10, 1975, to open any judgment that may have been entered thereon, to amend the findings of fact and conclusions of law or make new findings and conclusions, to amend and direct the entry of a new judgment and for a new trial, and for a stay.

In brief, the plaintiff sued the defendants (hereinafter referred to as "defendant") on four (4) separate claims:

(1) The first claim for breach of an employment agreement in the sum of $48,082.19;

(2) The second claim to recover $35,[illegible].00 for severance pay, pursuant to the written contract;

(3) A claim for a two and one-half percent (2 1/2%) incentive bonus by reason of any increment of fiscal 1972 net income over fiscal 1971 net income; and

(4) A claim for a declaratory judgment as to the bonus of two and one-half percent (2 1/2%) for fiscal 1973 over 1971.

Since this Court found that the plaintiff is entitled to recover on the first claim, which was for wrongful discharge, it held that the plaintiff is not entitled to severence pay, as alleged under his second claim. No award was made to the plaintiff under his third claim, in that it was found that he failed to sustain his burden of proof. The fourth claim was dismissed in that, there was no evidence to sustain it.

There are three (3) main issues to be resolved in connection with this motion, and they are as follows:

(1) Whether the plaintiff was entitled to recover at all.

(2) Upon the finding of a recovery in plaintiff's favor, whether it should have been under the second claim, instead of the first claim.

(3) Whether the damages were correctly computed in accordance with law.

AS TO THE PLAINTIFF'S ENTITLEMENT TO RECOVERY.

This Court hearing this case non-jury found as a fact that "even if there was a waiver of the written termination provision, the plaintiff did not orally resign or offer his resignation to the defendants,"(Opinion dated January 8, 1975 page 7). This issue must however be resolved in accordance with the agreement dated April 5, 1971 (plaintiff's exhibit "1" in evidence). It is there specifically provided in paragraph "6" thereof that "No modification or termination of this Agreement shall be valid unless in writing and signed by GAVIN and the COMPANY." A fair reading and interpretation would simply mean that both parties must sign a writing in order to change the agreement. However, as this Court found, in its findings there has been numerous modifications without a writing executed by both parties. Since the parties acted upon all those modifications many of which were made solely at a Board of Directors meeting, similar application should be made as to the termination of plaintiff's employment at a Board of Directors meeting, which was held on April 6th, 1973 (defendant's exhibit "S" in evidence).

the circumstances here presented, I do

The point is that equal application should be given to the action of the Board of Directors since it is in both instances a modification or a termination which required the writing by both parties and it is so set forth in one and the same sentence of the written agreement. In addition, on the evidence adduced at the trial, each member of the Board of Directors that was present at the meeting and all of whom testified, understood that there had been a resignation given by the plaintiff. It is submitted, that it is of no moment, that the plaintiff was not present during the afternoon session of the Board meeting on April 6th, 1973. A quorum was present at that session, so that even if the plaintiff was present, he would have been outvoted four (4) to one (1). By his absence, the vote was unanimous by the four (4) members present. It therefore was a distinction without a difference as to the actual physical presence of the plaintiff.

It is respectfully submitted that this Court erred in a finding which it made, when it stated that the minutes made no mention, that at the Board meeting plaintiff repeatedly denied that he had offered to resign or that he issued an ultimatum, although he later admitted that before the meeting, he had issued one (Opinion p.9). In respect to this, defendants' exhibit "S" in evidence states as follows:

"Mr. Gavin and Mr. Gerald Sprayregen then disagreed as to whether or not such ultimatum had been issued. Mr. Herman Sprayregen then asked Mr. Gavin to state to the Board whether, in fact, he had made such a statement. Subsequently, Mr. Gavin acknowledged that he had, in fact, made the statement attributed to him by the Chairman"

A copy of defendants' exhibit "S" is annexed hereto and forms part hereof.

The finding of fact that the plaintiff did not tender or in fact actually resign from his position is contrary to the weight of the evidence. The continued meeting of the Board on April 6th, 1973 during the afternoon session significantly attested to the resignation by the plaintiff and its acceptance by the Board of the defendant. It was so understood by each and every Board member. The Board meeting was not concluded in the morning, the plaintiff signed a waiver in respect to notice of the meeting and was therefore bound by each and every resolution that was passed by the Board, even though he was only present during the morning session and during the recess between the morning and afternoon sessions.

It is therefore submitted, that amended findings of fact and appropriate and corollary conclusions of law therefore be made as a result of the aforesaid so as to deny to the plaintiff a judgment in respect to his first claim.

WHETHER THE RECOVERY IN FAVOR OF THE PLAINTIFF SHOULD NOT HAVE BEEN UNDER THE SECOND CLAIM INSTEAD OF THE FIRST CLAIM.

Although as heretofore indicated, the defendant disagrees with the ultimate finding of this Court as to liability in favor of the plaintiff, it is submitted that for the purposes of this

could be drawn from the evidence adduced was that plaintiff had

motion the Court in any event mandated recovery on the wrong theory and in respect to the wrong claim. The factual authority, that is germane for this proposition is, "Should the COMPANY at any time from April 5, 1973 to April 5, 1974 terminate GAVIN'S employment for any reason whatever, including but not limited to GAVIN'S inability to perform, merger, dissolution or sale of stock or assets of the COMPANY, GAVIN will receive severance pay in the amount of $35,000. per annum, payable in equal monthly installments at the end of each month until April 5, 1974."(plaintiff's exhibit "1" in evidence, agreement of April 5, 1971, para. 2).

The basic issue is whether in view of that clause, the plaintiff may recover damages for wrongful discharge, or is the agreement binding. It is submitted that the parties are bound by the agreement as and when written and that the aforesaid provision should not be disregarded. It may be that the gross recovery allowed herein in the sum of $48,082.19 was based upon the plaintiff's then salary, but no such provision was set forth in the agreement. If the parties desired that the severance pay that would be payable in the event of a termination should be at the salary that the plaintiff was receiving at such termination, then it could have so stated in plain unambiguous language. Instead, the parties specifically fixed the severance pay in the amount of $35,000.00 per annum. This in effect was a liquidated damage provision. If at the time of the termination, the plaintiff was in fact receiving a sum less than $35,000.00 would the plaintiff then be satisfied to recover that lesser sum as his initial damages

as opposed to the stipulated sum of $35,000.00? The severance pay clause could have clearly stated that if there were any increases in salary to the plaintiff during the life of the contract, then the severance pay would be accordingly increased to that amount. The clause itself is clear on its face and should not be rewritten. There was no evidence that this clause was ever changed by the parties in any manner.

To give effect to the terms of the termination clause, it must encompass any type of a discharge. How else could the employee be terminated? The plaintiff must be told by someone that his services are no longer required, whether it is by the Chairman of the Board or the Board of Directors. Once the plaintiff is informed that his services are no longer needed, regardless of the form it takes, that is tantamount to a termination under paragraph "2" of the agreement. It is at that juncture that the $35,000.00 damage clause becomes applicable. Would the determination insofar as the parties are concerned have been any different if the Board or the Chairman of the Board notified the plaintiff, either orally or in writing that he is not to return to work any further? Would that be considered a wrongful discharge or a termination? Can any distinction be so made in the light of the agreement of the parties? It appears that, that is the very reason for the clause since it is specifically set forth that the plaintiff's employment may be terminated " for any reason whatever ".

adjudged the wrongdoers, cannot claim the benefit of the lower

Consequently, the finding and conclusion that the plaintiff is entitled to recover on his first claim in the sum of $48,082.19 is erroneous, it is submitted. This finding and conclusion should be amended and corrected so that if there is any recovery in favor of the plaintiff, it should be on the second claim in the sum of $35,000.00.

WHETHER THE MITIGATION DEFENSE WAS PROPERLY CONSIDERED.

It was found that plaintiff's total income from employment and consultative activities for the period from April 6th, 1973 to April 5, 1974 amounted to TWENTY-THREE THOUSAND ONE HUNDRED AND ELEVEN ($23,111.00) DOLLARS. However, it is submitted, that the losses from the tape business of the plaintiff, which were then deducted in the sum of FOURTEEN THOUSAND EIGHT HUNDRED AND EIGHTY-FOUR ($14,884.00) DOLLARS, should not have been charged to the defendant. On a finding of recovery in favor of the plaintiff, the initial amount should have been THIRTY-FIVE THOUSAND ($35,000.00) DOLLARS, as hereinbefore indicated, and from this amount the defendant is entitled to a credit of TWENTY-THREE THOUSAND ONE HUNDRED AND ELEVEN ($23,111.00) DOLLARS, which makes a net difference in favor of the plaintiff, in the sum of ELEVEN-THOUSAND EIGHT HUNDRED AND EIGHTY-NINE ($11,889.00) DOLLARS. That is the extent of the plaintiff's recovery, which however the defendant does not concede, but it is only pointed out for the purposes of

this motion only.

The defendant should neither be an insurer nor a partner of the plaintiff in the business risk which he undertook. Once he engaged in his own business, he eliminated himself from the job market. It is immaterial whether he acted in good faith or not. The just and equitable principle would be that by taking the risk of being an entrepreneur, then the plaintiff condoned or waived his right to the recovery of damages. Assume that the plaintiff made no income from his own business, but instead sustained a loss, for example, of FIFTY THOUSAND ($50,000.00) DOLLARS. Could it be argued that in addition to the THIRTY-FIVE THOUSAND($35,000.00) DOLLARS, the plaintiff should be credited with that amount and so have a recovery of EIGHTY-FIVE THOUSAND ($85,000.00) DOLLARS? The plaintiff was not under any onus to enter into his own business. He could have rested on a good faith showing that he attempted to obtain other employment, made the income from the consultative fees that was testified to, and then seek a recovery on the damages that he may be entitled to, less the income that he earned. It is unfair, inequitable and unjust to charge the defendant and credit the plaintiff with the loss in the sum of FOURTEEN THOUSAND, EIGHT HUNDRED AND EIGHTY-FOUR ($14,884.00) DOLLARS.

This motion is being instituted within ten (10) days after the opinion of this Court has been entered on the docket. The docketing date is set forth as January 10, 1975 on the postal card received from this Court.

The reason why an order to show cause is requested, is in order to obtain a stay of the execution, and enforcement of any judgment that was entered, or may have been entered in this matter, pending a determination of this motion on the merits.

No previous application has been made to this, or any other Court or Judge, for the relief requested herein.

WHEREFORE, it is respectfully requested that this Court sign the annexed order to show cause and grant the relief requested therein and for such other and further relief as to this Court may seem just and proper.

Sworn to before me this
16th day of January, 1975.

SAM PANISH

Notary Public

NORMAN C...
...
Qualified in ... County
...

S 49

DEFENDANT'S EXHIBIT S - ANNEXED TO AFFIDAVIT OF SAM PANISH

MINUTES OF A SPECIAL MEETING OF THE BOARD OF DIRECTORS OF TECHNICAL TAPE, INC.
Held April 6, 1973

A Special Meeting of the Board of Directors of Technical Tape, Inc., (the "Company") was held on Friday, April 6, 1973 at 200 Park Avenue, Suite 2020, New York, New York at 8:30 A.M.

Waivers of Notice of Meeting, signed by the Directors of the Company, were presented to the meeting and filed as part of these minutes.

The following Directors, constituting a quorum of the Board, were present:

Richard Bernard
John A. Gavin
Gerald Sprayregen
Herman Sprayregen
Howard Weitz

W. David Robbins and Don Silvestri were absent from the meeting.

Mr. Gerald Sprayregen acted as Chairman of the meeting and Mr. Howard Weitz acted as Secretary.

The Chairman stated that the purpose of the meeting was to consider and act upon an ultimatum issued by Mr. John Gavin to the Chairman on Tuesday, April 3, 1973 at Mr. Gavin's office in New Rochelle, New York to the effect that, unless the employment of Mr. Donald Moran, Vice President of Marketing of the Company, was terminated by April 6, 1973, Mr. Gavin would immediately resign as a Director and as President of the Company

and its subsidiaries. Mr. Gavin and Mr. Gerald Sprayregen then disagreed as to whether or not such ultimatum had been issued. Mr. Herman Sprayregen then asked Mr. Gavin to state to the Board whether, in fact, he had made such a statement. Subsequently, Mr. Gavin acknowledged that he had, in fact, made the statement attributed to him by the Chairman. After discussion, Mr. Herman Sprayregen proposed that a vote be taken by the Board as to whether or not Mr. Moran's employment by the Company should be terminated. All of the Directors present, except Mr. Gavin, thereupon voted in favor of Mr. Moran's employment not being terminated.

Messrs. Bernard, Herman Sprayregen and Weitz thereupon left the meeting and the meeting was accordingly recessed until later in the day.

At 3:00 P. M., the meeting was reconvened at the same place and there were then present Messrs. Richard Bernard, Gerald Sprayregen, Herman Sprayregen and Howard Weitz, constituting a quorum of the Board. Mr. Gavin was absent from the reconvened meeting.

The Chairman then stated that it would be in order for the Board to act upon Mr. Gavin's resignation as a Director and as President of the Company. Upon motion duly made by Herman Sprayregen and seconded by Mr. Weitz, it was unanimously

> RESOLVED, that the resignation of John Gavin as a Director and as President and Chief Operating Officer of the Company, and as a Director and as an Officer of each of the Company's subsidiaries in which he serves in such position or positions is hereby accepted, such resignation to be effective immediately.

The Chairman then stated that he had met with Mr. Gavin for approximately three hours after the morning meeting had been recessed. The Chairman

reported that Mr. Gavin had requested that he receive from the Company an amount in cancellation of his employment arrangement with the Company. The Chairman then stated that, since Mr. Gavin had resigned from the Company, he would not at this time recommend that any immediate arrangement be made with Mr. Gavin, but that further study of the matter would be made and counsel for the Company would be consulted.

Discussion thereupon ensued concerning the office of President vacated by Mr. Gavin. Mr. Gerald Sprayregen was thereupon duly nominated by Mr. Bernard to serve as President of the Company in addition to the other offices held by Mr. Gerald Sprayregen. Mr. Weitz seconded Mr. Sprayregen's nomination whereupon it was unanimously

> RESOLVED, that Gerald Sprayregen is hereby elected to the office of President of the Company, in addition to his offices as Chairman of the Board and Chief Executive Officer, for the ensuing year and until his successor is duly elected and shall have qualified.

Discussion thereupon followed concerning the advisability of publicly announcing Mr. Gavin's resignation. It was the consensus of the Directors that such announcement should be made on Monday morning, April 9, 1973. Mr. Weitz was then instructed to issue an appropriate news release at that time.

The Chairman next stated that the resignation of Mr. Gavin had also created a vacancy on the Executive Committee of the Company. Mr. Bernard thereupon duly nominated Mr. Herman Sprayregen to serve as a member of the Executive Committee, which nomination was seconded by Mr.

Weitz. Whereupon, it was unanimously

RESOLVED, that Herman Sprayregen is hereby elected to serve as a member of the Executive Committee for the ensuing year and until his successor is duly elected and shall have qualified.

There being no further business, the Special Meeting of the Board of Directors was thereupon adjourned.

Secretary

Dated: April 6, 1973
New York, New York

had never seen a copy of the subject employment agreement

WAIVER OF NOTICE OF SPECIAL MEETING
OF THE BOARD OF DIRECTORS
OF TECHNICAL TAPE, INC.
TO BE HELD APRIL 6, 1973

The undersigned hereby waives notice of a Special Meeting of the Board of Directors of Technical Tape, Inc., to be held on Friday April 6, 1973 at 8:30 A.M. at Suite 2020, 200 Park Avenue, New York, New York for the purpose of considering and acting upon such matters as may be brought before the meeting.

Richard Bernard

John Gavin

Don Silvestri

Gerald Sprayregen

Herman Sprayregen

Howard Weitz

Dated: April 6, 1973
New York, New York

not be liable for damages at all."

WAIVER OF NOTICE OF SPECIAL MEETING
OF THE BOARD OF DIRECTORS
OF TECHNICAL TAPE, INC.
TO BE HELD APRIL 6, 1973

The undersigned hereby waives notice of a Special Meeting of the Board of Directors of Technical Tape, Inc., to be held on Friday April 6, 1973 at 8:30 A. M. at Suite 2020, 200 Park Avenue, New York, New York for the purpose of considering and acting upon such matters as may be brought before the meeting.

W. David Robbins

Dated: April 5, 1973
Richmond, Virginia

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -

JOHN A. GAVIN,

Plaintiff,

73 Civ. 2120 (EW)

-against-

TECHNICAL TAPE, INC., et ano.,

Defendants.

AFFIDAVIT IN OPPOSITION

- -

STATE OF NEW YORK :
COUNTY OF NEW YORK : SS.:

AMOS ALTER, being duly affirmed, deposes and says:

1. I am a member of the bar of this Court, and am associated with Parker, Chapin and Flattau, attorneys for the plaintiff, John A. Gavin. I make this affidavit in opposition to defendants' motion for new findings and conclusions following a non-jury trial (Rule 52, Federal Rules of Civil Procedure), and for a new trial (Rule 59).

2. After defendants withdrew their counterclaim at the end of trial, which the Court expressly noted was not interposed in good faith (Opinion,* pp. 3-4), this action became what it had originally been--a simple diversity breach of employment contract case, the fundamental issue being whether plaintiff was wrongfully discharged, as he claimed, or whether he had orally resigned, as defendants claimed. The contract contained a no-oral-termination clause, and the Court, after a non-jury trial, expressly found (Opinion, p. 7) that

*Reference is to the Opinion, Findings of Fact and Conclusions of Law of this Court, filed 10 January, annexed hereto as Exhibit "A".

> "[U]pon all the evidence and under the circumstances here presented, I do not find that the parties. . .intended to waive the provision against oral termination.
>
> "Moreover, based upon all the evidence, I find that. . .the plaintiff did not orally resign or offer his resignation to the defendants."

3. The Court further found (Opinion, p. 9), based on the undisputed facts, that

> "Plaintiff reported to his office the next business day following the meeting [at which defendants claimed he had orally resigned], prepared to carry on his duties, but was prevented from doing so by Gerald Sprayregen [defendants' Chairman of the Board], who earlier that morning removed plaintiff's belongings from his office."

4. The Court accordingly awarded damages to plaintiff for his unpaid salary of $48,082.19, less the net amount of $8,227 found earned in mitigation, for a total of $39,855.19 (Opinion, pp. 10-11). The Court further concluded (Opinion, p. 10) with respect to plaintiff's claim for severance pay, that he was not entitled thereto since he was awarded damages based upon his salary for the balance of the contract period.

5. Defendants have now moved for new findings and conclusions, and for a new trial. As appears more fully hereinafter and in the accompanying Memorandum of Law, the motion is entirely without merit, and must be dismissed with motion costs to the plaintiff.

6. In the first place, the matters that defendants seek to argue on this motion may not properly be considered either on a motion for new findings and conclusions, or on a motion for a new trial. As is demonstrated in the accompanying Memorandum of Law, it is not proper for a party to move for amendments or additional or different findings that

in effect seek a reversal of the judgment. A Rule 52(b) motion cannot serve as a vehicle for a rehearing on the merits. The same objection exists with respect to the motion when considered under Rule 59. As is also demonstrated in the accompanying Memorandum, if, as defendants claim, this Court erred on the law, their remedy is by appeal, not by motion for a new trial, unless there appears on the face of the record error amounting to a manifest misapprehension of law, which is clearly not the case here. A mistake of fact sufficient to sustain a motion under Rule 59 must also appear on the face of the record, and be a manifest mistake, clearly erroneous. Since this Court erred on neither the facts nor the law, and certainly, even under defendants' version, did not on the face of the record make any manifest error, the motion must be in all respects denied with costs.*

7. Furthermore, the "errors" that defendants urge are clearly not errors at all, but manifestly correct determinations. Thus, defendants assert that this Court erred in finding no resignation by plaintiff. This factual argument (actually an attempted reargument) is in any event legally irrelevant, because the contract contained a no-oral-termination clause. This Court expressly found this clause not to have been waived (Opinion, p. 7), and no challenge is here raised to this finding. No oral termination may thus be asserted as a matter of law. Furthermore, the finding of no oral termination in any case was clearly correct. The inference most favorable to defendants that

*While a new trial may in some circumstances be granted because of newly discovered evidence, no such claim is made on this motion.

could be drawn from the evidence adduced was that plaintiff had given an ultimatum to resign, not a resignation (although defendants' witnesses contradicted each other and the board minutes [Defendants' Exhibit "S" in evidence] as to what the terms of the alleged ultimatum were). As this Court correctly observed (Opinion, p. 8):

> "An ultimatum of what one would do is different from what one actually does."

8. Defendants' second assigned error is that this Court erred in awarding damages under plaintiff's first claim for breach ($39,855.19, as computed by the Court [Opinion, pp. 10-11]), rather than for severance pay under plaintiff's second claim ($35,000.00). The basis of defendant's argument is the assertion (moving affidavit, p. 6), that the severance pay provision "in effect was a liquidated damages provision", and thus is the only measure of plaintiff's damages. Since this contention is clearly incorrect, the motion must be denied.

9. It must first be noted that this assertion, since it is a matter in avoidance of liability, should have been pleaded as an affirmative defense to plaintiff's first claim. However, defendants wholly failed to plead this in their original answer; in the proposed amended answer (despite the presence of seventeen other proposed affirmative defenses); in their actual amended answer; or in the amendment they sought to make at trial. This new proposed affirmative defense, sought to be raised now for the first time only after trial, is manifestly late and clearly cannot be

considered.*

10. In any event, it does not appear from the face of the contract (Plaintiff's Exhibit 1 in Evidence, Exhibit "B" hereto) that the severance pay provision is a liquidated damages clause, and the trial record is entirely devoid of any evidence on this point other than the face of the contract.** The clause in question refers to "severance pay", and does not mention liquidated damages. It states that it is payable inter alia, if the termination is due to "GAVIN'S inability to perform", a case where defendants obviously would not be liable for damages at all. It makes no recitation of the diffuculty of computing damages in case of breach, and any such recitation clearly would have been false. It fixes the severance pay rate ($35,000 per annum) at the same figure as the original salary rate therein provided for, thus arbitrarily setting the mitigation figure at zero, clearly an unreasonable figure.*** In short, on the face of the record, it does not appear that the severance pay clause is "in essence a liquidated damages clause". Therefore, it cannot limit plaintiff's actual damages for breach. Certainly it cannot be said on the face of the record that the Court made a manifest error, or that its finding is clearly erroneous.

11. If the severance pay provision is not a liquidated damages clause, then there is no reason why it should limit

*If defendants raised the issue in their proposed findings and conclusions or in their trial memorandum, plaintiff is unaware of the fact, because defendants never saw fit to serve same on plaintiff.

**The failure of defendants to give notice of their intent to assert this affirmative defense clearly prejudiced plaintiff in that he was not on notice to offer evidence on this point.

***By comparison, this Court found $23,111 gross, and $8,227 net, earned in mitigation (Opinion, p. 11).

plaintiff's damages. Certainly defendants, who have been adjudged the wrongdoers, cannot claim the benefit of the lower of plaintiff's two theories of damage. Defendants' arguments on this point must therefore be rejected, and their motion denied.

12. Defendants' final argument on this motion is that the gross amount found in mitigation, $23,111, should not have been lowered by the $14,884 found by this Court to have been plaintiff's loss in a tape business "engaged in following his discharge in a reasonable and good faith effort to generate income" (Opinion, p. 11) This contention is simply contrary to the law, as is demonstrated in the accompanying Memorandum of Law. It can therefore form no basis for granting this motion, which must accordingly be denied.

13. It is thus clear that defendants' arguments are nothing more than an attempt to relitigate this action, which cannot be the basis for a Rule 52 or Rule 59 motion. It is furthermore clear that the alleged errors assigned are not errors, but that the Court was manifestly correct in its findings and conclusions. Certainly no error was committed of the magnitude necessary to justify granting this motion, rather than relegating defendants to their remedy by appeal. Accordingly, the motion must be in all respects denied, with costs.

/s/
Amos Alter

Affirmed to before me on
January 24, 1975.

ROSE A. DART
Notary Public, State of New York
No. 24 [illegible]3675
Qualified in [illegible]s County
Certificate filed in New York County
Commission Expires March 30, 1975

EXHIBIT - OPINION OF JUDGE WEINFELD DATED JANUARY 8, 1975

(Printed herein at p.450a)

EXHIBIT B - CONTRACT

(Printed as Plaintiff's Exhibit 1 in Exhibit Volume)

AFFIDAVIT OF GERALD A. FOX IN SUPPORT OF MOTION FILED FEBRUARY 2, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN A. GAVIN,

Plaintiff,

- against -

TECHNICAL TAPE, INC., and TUCK INDUSTRIES, INC.,

Defendants.

73 Civ. 2120 (E.W.)

AFFIDAVIT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GERALD A. FOX, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court, attorney of record for the defendants herein and Vice President, General Counsel and Secretary of defendants Technical Tape, Inc. and Tuck Industries, Inc. (hereinafter referred to as "defendants"). I respectfully submit this affidavit in further support of defendant's application to amend the opinion, findings of fact and conclusions of law of this Court, entered on January 10, 1975, to open any judgment that may have been entered thereon, to amend the findings of fact and conclusions of law or make new findings and conclusions, to amend and direct the entry of a new judgment and for a new trial, and for a stay.

2. Annexed hereto as Exhibit "A" are the calculations which, it is respectfully submitted, this Court should employ as the basis for determining plaintiff's damages, if plaintiff is held by this Court to be entitled to any damages, pursuant to plaintiff's second claim set forth in plaintiff's complaint herein. The relevant provision of the written employment agreement between the parties, dated April 5, 1971 (plaintiff's exhibit "1" in evidence, para. 2), provides that "Should the COMPANY at any time from April 5, 1971 to April 5, 1974 terminate

GAVIN'S employment for any reason whatever, including but not limited to GAVIN'S inability to perform, merger, dissolution or sale of stock or assets of the COMPANY, GAVIN will receive severance pay in the amount of $35,000 per annum, payable in equal monthly installments at the end of each month until April 5, 1974." (emphasis added).

3. As specifically and unambiguously provided for in said paragraph 2 of the employment agreement, in the event that defendant terminated plaintiff's "employment for any reason whatever" "at any time from April 5, 1971 to April 5, 1974," plaintiff was to receive severance pay in the amount of $35,000 per year, "payable in equal monthly installments at the end of each month until April 5, 1974." There has been no evidence or any suggestion whatsoever in the trial record, during the examinations before trial or in any papers submitted in this action, etc., that this provision in the employment agreement providing for severance pay has been amended or modified by changing the $35,000 per annum amount therein to $50,000 per annum, or in any other respect whatsoever.

4. If plaintiff is entitled to recover any damages in this action, his damages, as a matter of law, must be pursuant to the second claim of plaintiff's complaint and any such damages must be computed in accordance with the specific provisions of paragraph 2 of the subject employment agreement, as specifically bargained for and agreed to by the parties herein. The calculations for any such damages are set forth in Exhibit "A" hereto.

5. This Court found that "Plaintiff's services were terminated at the end of two years on April 6, 1973." (Opinion,* p. 4.) The remaining term of the subject employment

*Reference is to the Opinion, Findings of Fact and Conclusions of Law of this Court, filed January 10, 1975.

agreement was therefore a couple of days less than one year. 492a
However, for the purposes of simplifying these calculations, we shall give plaintiff the benefit of these extra days and base these calculations on a one year period.

6. Assuming that, solely for purposes of this calculation, the relevant time period for plaintiff to receive "severance pay" under paragraph 2 of the employment agreement is the one year period from April 5, 1973 to April 4, 1974, then pursuant to said paragraph 2 plaintiff would have been entitled to receive severance pay of $35,000, "payable in equal monthly installments at the end of each month." Therefore, plaintiff would have been entitled to receive $2,916.66 on May 4, 1973 and $2,916.66 on the fourth day of each month for ten (10) additional months (to and including March 4, 1974) and $2,916.74 on April 4, 1974.

7. Interest on these severance payments is not due from the date of plaintiff's discharge, April 6, 1973, but said interest should be calculated at the rate of 6% per annum on the monthly severance payments, beginning with the severance payment due on May 4, 1973. Since the first such payment was due on May 4, 1973, interest on said payment should first be calculated on the June 4, 1973 payment date. As indicated in Exhibit "A", the total interest for the relevant period to April 4, 1974 would be $962.48. Additional interest would be computed for the period April 4, 1974 to February 4, 1975, a period of ten (10) months. Interest at 6% for said ten (10) months' period would be $1,750.00. Therefore, the total interest payable to plaintiff to February 4, 1975 would be $2,712.48. This interest plus the $35,000 severance pay totals $37,712.48. Interest for each additional day past the February 4, 1975 date, computed at the rate of 6%, amounts to $5.83 per day.

8. This Court stated in the Opinion of January 10, 1975 that:

> "It is significant that if plaintiff had tendered his resignation or in fact actually resigned, no resolution was proposed or passed by the Board accepting the resignation while he was still present at the Board meeting. This is all the more significant since one of the Board members was counsel to the corporation and familiar with the contract which contained the provision requiring a writing signed by both parties for its termination." (Opinion, pp. 8-9) (emphasis added).

The above reference to "one of the Board members" was to Howard Weitz, who was then Vice President, Corporation Counsel and Secretary of defendant Technical Tape, Inc. and a member of its Board of Directors. It must be noted that there was no evidence whatsoever that Mr. Weitz was "familiar with" the subject employment agreement. Defendant did not offer any evidence on this point at the trial, since defendant was not aware that this was a relevant fact. However, in light of the above-quoted portion of this Court's Opinion, this Court obviously held that whether Mr. Weitz was familiar with the subject employment agreement was a relevant factor in arriving at this Court's findings and conclusions.

9. Annexed hereto as Exhibit "B" is a letter, dated May 25, 1973, from Howard Weitz to Jack Rocca of the law firm of Silberfeld, Danziger & Bangser. Mr. Weitz stated in said letter that he was enclosing the "complaint served by John Gavin against Technical Tape." Various papers on file with this Court establish the fact that the law firm of Silberfeld, Danziger & Bangser initially represented defendant herein. Mr. Rocca is the attorney at said law firm who did most of the work for said firm in representing defendant herein.

10. Said Exhibit B states that:

> "Although there has been reference to an employment agreement in the corporate records and in the complaint, we have searched our files and have been unable to locate an actual agreement." (emphasis added).

I discussed this matter with Mr. Weitz over the telephone on January 16, 1975 and he advised me that, as of that date, he had never seen a copy of the subject employment agreement.

11. On April 5, 1974, I discussed this subject with Mr. Jack Rocca over the telephone. Mr. Rocca advised me at that time that he had never seen a copy of the subject employment agreement. On January 29, 1975, I again discussed this subject with Mr. Rocca over the telephone and he advised me that neither he, nor any other attorney at Silberfeld, Danziger & Bangser, had ever seen a copy of the subject employment agreement. Mr. Rocca also stated that when Silberfeld, Danziger & Bangser turned over all of its files relating to this action to Skadden, Arps, Slate, Meagher & Flom, the law firm which next represented defendant herein, said files did not include a copy of the subject employment agreement.

12. On January 29, 1975, I discussed this matter over the telephone and in person with an associate at Skadden, Arps, Slate, Meagher & Flom, the law firm which was substituted for Silberfeld, Danziger & Bangser as attorneys of record for defendant herein by a stipulation substituting attorneys, dated November 9, 1973. This associate, who had worked on this case on behalf of defendant when Skadden, Arps, Slate, Meagher & Flom represented defendant, advised me that he "has no present recollection of having seen" a copy of the subject employment agreement when Skadden, Arps, Slate, Meagher & Flom first received the files on the instant litigation from Silberfeld, Danziger & Bangser.

13. The affidavit of Mr. Amos Alter, an associate of the law firm representing plaintiff herein, affirmed January 24, 1975, and submitted in opposition to defendant's motion for new findings and conclusions following a non-jury trial, and for a new trial, states on page 5 therein with reference to the relevant

clause of paragraph 2 of the subject employment agreement that:

> "It states that it is payable inter alia, if the termination is due to 'GAVIN'S inability to perform', a case where defendants obviously would not be liable for damages at all."

Similarly, Plaintiff's Memorandum of Law in Opposition to Motion for a New Trial, dated January 24, 1975, states on page 12 with reference to the relevant clause of the employment agreement that:

> "It states that it is payable if, inter alia, the termination is due to 'GAVIN'S inability to perform', a case where defendants obviously would not be liable for damages at all."

14. To put it quite mildly and politely, plaintiff's said Memorandum of Law and Mr. Alter's said Affidavit in Opposition both omitted the most relevant provisions of paragraph 2 of the employment agreement when they stated that severance pay was payable to plaintiff "inter alia" if the termination of plaintiff was due to plaintiff's "inability to perform." Setting forth the relevant section of paragraph 2 of the employment agreement shows that plaintiff's contention on this point is ludicrous and patently illogical. The relevant section of paragraph 2 of the employment agreement in its entirety reads as follows:

> "Should the COMPANY at any time from April 5, 1971 to April 5, 1974 terminate GAVIN'S employment for any reason whatever, including but not limited to GAVIN's inability to perform, merger, dissolution or sale of stock or assets of the COMPANY, GAVIN will receive severance pay in the amount of $35,000 per annum, payable in equal monthly installments at the end of each month until April 5, 1974." (emphasis added).

This section of the employment agreement speaks for itself. It clearly and obviously provides that if defendant terminated plaintiff's employment "at any time from April 5, 1971 to April 5, 1974" (this Court found in its Opinion herein that defendant terminated plaintiff's employment on April 6, 1973) "for any reason whatever," then plaintiff would receive the severance pay

specified and set forth in said paragraph 7.

15. This Court, in its Opinion filed January 10, 1975, stated that:

> "While prior to the [Board] meeting at a conference with Sprayregen the plaintiff may have used language that suggested the ultimatum that he would resign if Moran were not fired, he did not in fact tender his resignation or resign either at the Board meeting or at any time prior thereto. An ultimatum of what one would do is different from what one actually does." (emphasis added). (Opinion, p. 8)

While it is true that defendant herein has sometimes inaccurately used the term "ultimatum" to characterize plaintiff's statements to Mr. Gerald Sprayregen of April 3, 1973, it is respectfully submitted that this was a most unfortunate choice of words and the term "ultimatum" is actually and clearly a misnomer in describing said statements of plaintiff.

16. What actually happened when Mr. Gerald Sprayregen, Chairman of the Board of defendant, went to plaintiff's office in New Rochelle on April 3, 1973, upon the request of plaintiff, was that plaintiff said to Mr. Sprayregen that plaintiff was resigning immediately if Mr. Sprayregen did not at that exact moment in time give plaintiff permission to fire Don Moran immediately or the very next day. This was not an "ultimatum." Plaintiff was clearly tendering his resignation to Mr. Sprayregen on April 3, 1973 (i.e., plaintiff was resigning immediately effective as of April 3, 1973) if Mr. Sprayregen did not, right then and there, give plaintiff his approval to fire Don Moran, as plaintiff had requested. As is set forth in the record herein, Mr. Sprayregen finally persuaded plaintiff to give Mr. Sprayregen "one day or two" to consider this matter.

17. Another member of the defendant's Board of Directors, Mr. Donald Silvestri, testified on this subject at the trial. Pursuant to Mr. Sprayregen's request (as plaintiff testified at the trial), Mr. Silvestri met with plain-

tiff for lunch at the Carriage Inn restaurant in Larchmont, New York, on April 4 or April 5, 1973 in order to attempt to persuade plaintiff not to resign immediately.

18. Eventually, Mr. Gavin was persuaded to have the question of whether Don Moran was to be fired, or Mr. Gavin's resignation of April 3, 1973 was to be accepted, placed before the Board of Directors of defendant for determination by the Board. As indicated in the minutes of said Board meeting of April 6, 1973 (defendant's exhibit "S" in evidence), the Board voted not to terminate Don Moran and voted to accept the resignation of Mr. John Gavin. It must be noted that at the trial Mr. Gerald Sprayregen, Mr. Herman Sprayregen, Mr. Richard Bernard and Mr. Howard Weitz (the four members of the Board present at the Board meeting of April 6, 1973, besides plaintiff) all testified that the Board voted at said meeting not to terminate Don Moran and voted to accept the resignation of Mr. John Gavin. The Board was not voting upon Mr. Gavin's "ultimatum," but on Mr. Gavin's resignation, tendered on April 3, 1973 and accepted by the Board on April 6, 1973.

19. It is respectfully submitted that it would indeed be manifestly inequitable and unfair for this case to be decided against defendant solely on the basis of a question of semantics, an unfortunate choice of words. On April 6, 1973, defendant's Board of Directors was presented with the clear choice of either voting to fire Don Moran or voting to accept Mr. John Gavin's resignation of April 3, 1973. Mr. Gavin's tendered resignation was a fait accompli; it had been submitted to Mr. Sprayregen on April 3, 1973 and Mr. Gavin had not issued an ultimatum, but had clearly and unequivocally tendered his resignation.

20. This Court, in its Opinion filed January 10, 1975, stated that:

> "Further, I find that the plaintiff incurred losses in a tape business he engaged in following his discharge in a reasonable and good faith effort to generate income. The losses amounted to $14,884, which, deducted from the gross income of $23,111, leaves net earnings of $8,227 to be deducted from the $48,082.19. Plaintiff is therefore entitled to a net recovery of $39,655.19, to which there is to be added interest from the date of discharge, April 6, 1973." (Opinion, p. 11) (emphasis added).

Mr. Gavin testified at the trial herein that said "tape business" was a "sole proprietorship" (i.e., owned 100% by Mr. Gavin) under the trade name of "Encore Tape & Label." Mr. Gavin testified that he commenced the operation of this business in either August 1973 or September 1973 and that Encore Tape & Label ceased its operations in 1974.

21. At and prior to the first session of the examination before trial of plaintiff by defendant herein, in March 1974, defendant demanded that plaintiff produce his business records relating to Encore Tape & Label and its 1973 and 1974 income. Plaintiff failed to comply with this request, despite defendant's duly executed and served notice to produce (which was also proper and compelling under the Federal Rules of Civil Procedure), which covered said business records. Said demands were repeated again by defendant at the second and third sessions of the examination before trial of plaintiff by defendant. Again, on both occasions, plaintiff failed to comply. Finally, defendant was forced to resort to the remedy of having a subpoena duces tecum served on Mr. Gavin's accountants in order to obtain these business records which defendant had repeatedly demanded since March 1974. At last, on January 7, 1975, the second day of the trial of this action, an accountant from the accounting firm employed by Encore Tape & Label appeared before this Court to testify and produce records in response to the aforesaid subpoena. Defendant's attorneys only had a very brief period of

WE HAVE A SENSE OF VALUE.

time to quickly and cursorily review said records, which included Mr. Gavin's United States income tax return for 1973 (defendant's exhibit "H" in evidence).

22. Subsequent to the close of the trial, defendant consulted tax attorneys and was advised that, in light of the facts adduced at the trial, Mr. Gavin would have deducted as part of the business expenses of Encore Tape & Label (cost of goods sold) for either his 1973 or 1974 United States income tax return the amount of $3,269.82, which represented purchases of pressure sensitive tape products made by Encore Tape & Label from defendant Tuck Industries, Inc. (hereinafter referred to as "Tuck"). Annexed hereto as Exhibit "C" are Xerox copies of correspondence between plaintiff (Encore Tape & Label) and Tuck, Tuck's invoices to Encore Tape & Label relating to the aforesaid sales by Tuck, Tuck's statement to Encore Tape & Label summarizing said sales and plaintiff's check in the amount of $500.00 payable to the order of Tuck in partial payment of the amount owed by Encore Tape & Label to Tuck with respect to the aforesaid merchandise.

23. It is respectfully submitted that, in light of plaintiff's continuous, repeated and deliberate defiance of defendant's notice to produce (which was a clear violation of plaintiff's obligations under the Federal Rules of Civil Procedure), and in light of the obviously indisputable and noncontroverted facts reflected in the documents annexed hereto as Exhibit "C", this Court should consider the documents in Exhibit "C," although they were not offered in evidence at the trial.

24. This Court found in its Opinion, filed January 10, 1975, that plaintiff's losses incurred as a result of the operations of Encore Tape & Label "amounted to $14,884" and deducted

said amount from plaintiff's gross income in computing plaintiff's "net earnings" in order to arrive at the net recovery which this Court found plaintiff was entitled to in this action. (Opinion, p. 11.) However part of this amount of $14,884. included the amount of $2,769.82 which plaintiff (doing business as Encore Tape & Label) still owes Tuck as of this date for merchandise plaintiff purchased from Tuck in 1973. (It should be noted that this amount of $2,769.82 includes taking into account plaintiff's payment of $500. to Tuck in September 1974.) Plaintiff deducted said amount of $2,769.82 in computing his losses allegedly incurred in his engaging in business as Encore Tape & Label; and this Court, in its Opinion of January 10, 1975, allowed said amount as a deduction in arriving at plaintiff's net recovery herein - but plaintiff has never paid said amount.

25. It is respectfully submitted that if plaintiff took deductions for Encore Tape & Label's purchases from Tuck in computing his alleged "losses," although plaintiff never paid for such purchases, perhaps Encore Tape & Label also took deductions for other purchases from other suppliers who have never been paid. This affidavit and Exhibit "C" hereto, clearly discredit $2,769.82 out of the $14,884. of "losses" allegedly incurred by Encore Tape & Label. If Encore Tape & Label has failed to pay other suppliers an amount equal to, or in excess of, $12,114.18, (this amount is computed by subtracting $2,769.82 from $14,884.) then plaintiff should not be entitled to deduct any portion of Encore Tape & Label's alleged "losses" of $14,884.

26. If this Court finds it necessary then a brief hearing for additional testimony can be taken to establish how the plaintiff computed his alleged losses in the sum of $14,884. Income tax returns are also subject to audit and are not accepted at face value. Taxpayers are not infallible in taking their

deductions and losses. In the event the Court declines this request, then at the very least, there should be deducted the sum of $2,769.82 (the amount of plaintiff's indebtedness to defendant), which was not in fact incurred as a loss, from the $35,000. liquidated provision, which makes a difference of $32,230.18.

WHEREFORE, it is respectfully requested that this Court grant the relief requested in the order to show cause and for such other and further relief as to this Court may seem just and proper.

Gerald A. Fox

Gerald A. Fox

Sworn to before me this
30th day of January, 1975.

SAM PANISH
NOTARY PUBLIC, State of New York
No. 30-8267435
Qualified in Nassau County
Commission Expires March 30, 1976

EXHIBITS ANNEXED TO AFFIDAVIT OF GERALD A. FOX

EXHIBIT A - CALCULATIONS

TUCK INDUSTRIES, INC.

EXHIBIT A

CONTRACT PERIOD 4/8/73 - 4/4/74

$3500000 PAYABLE IN 12 EQUAL INSTALLMENTS
ON THE 4TH OF EACH MONTH (ALL CALCULATIONS
BASED ON A 30 DAY INTERVAL)

EACH MONTHLY PAYMENT 11 X 291666 3208326
FINAL PAYMENT 291674 3500000

INTEREST TO BE COMPUTED AT THE
RATE OF 6%

INTEREST DATE	PRINCIPAL	INTEREST	1/12 x 6% = .005/month
5/4/73	291666	-	
6/4/73	291666	.005 x 291666 =	1458
7/4/73	291666	.005 x 583332 =	2916
8/4/73	291666	.005 x 874998 =	4375
9/4/73	291666	.005 x 1166664 =	5833
10/4/73	291666	.005 x 1458330 =	7291
11/4/73	291666	.005 x 1749996 =	8750
12/4/73	291666	.005 x 2041662 =	10208
1/4/74	291666	.005 x 2333328 =	11666
2/4/74	291666	.005 x 2624994 =	13125
3/4/74	291666	.005 x 2916660 =	14583
4/4/74	291674	.005 x 3208326 =	16041
TOTAL 4/4/74	3500000		146249

ADDITIONAL INTEREST
4/4/74 - 2/4/75
10 mos @ 6% x 3500000 = 175000

TOTAL 2/4/75	3500000	321249

PAYMENT DUE 2/4/75

TOTAL PRINCIPAL	3500000
TOTAL INTEREST	321249
TOTAL PAYMENT	3821249

INTEREST FOR EACH ADDITIONAL DAY
6% x 3500000 ÷ 360 DAYS = 583/DAY

EXHIBIT B

WE HAVE A SENSE OF VALUE.

May 25, 1973

Jack Rocca, Esq.
Silberfeld, Danziger & Bangser
230 Park Avenue
New York, N. Y. 10017

Dear Jack:

Enclosed please find complaint served by John Gavin against Technical Tape. Also enclosed are various papers in our files relating to Gavin's termination with his former employer prior to his being hired by Technical Tape. Although there has been reference to an employment agreement in the corporate records and in the complaint, we have searched our files and have been unable to locate an actual agreement. Note also that the complaint fails to annex a copy of that agreement.

I would suggest that, after you have had an opportunity to review the complaint, we sit down together and discuss the course of action we wish to take in this matter.

Sincerely,

Howard Weitz
Vice President and
Corporation Counsel

HW/e
encls.

cc: Lawrence Bangser, Esq.

TUCK INDUSTRIES, INC. LEFEVRE LANE, NEW ROCHELLE, NEW YORK 10801 TELEPHONE: 914 235-1000

EXHIBIT C1 - LETTER FROM GERALD A. FOX TO JOHN A. GAVIN DATED JULY 23, 1974

GERALD A. FOX
Vice President, General Counsel and Secretary

Technical Tape Inc.

July 23, 1974

SPECIAL DELIVERY
CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. John A. Gavin
and Encore Tape & Label
516 Highway #35
Neptune, New Jersey 07753

Dear Mr. Gavin:

I am writing you with reference to $3,269.82 which has been owed to Tuck Industries, Inc. for several months. Enclosed herewith are Xerox copies of the three invoices and a statement of this debt.

There is no dispute that you owe this amount to Tuck. If this matter is not promptly resolved, Tuck has no recourse except to bring a law suit against you for this long overdue debt. I am sure that you will wish to avoid the attorney's fees, court costs and interest charges which would result from a law suit.

I have been instructed to bring a legal action to collect this delinquent account if I do not hear from you within ten days from the date of this letter. I trust that you will contact me before then in order to avoid the additional expenses of litigation.

Very truly yours,

TUCK INDUSTRIES, INC.

By Gerald A. Fox
Gerald A. Fox
Vice President, General Counsel
and Secretary

GAF:cmg
Enclosures
cc: Mr. John A. Gavin
407 Beacon Blvd.
Sea Girt, New Jersey 08750

EXH. C-1

TUCK INDUSTRIES, INC. LEFEVRE LANE, NEW ROCHELLE, NEW YORK 10801

WE HAVE A SENSE OF VALUE.

D-U-N-S NO. 00-152-4818

(914) 235-1000

INVOICE DATE	CUSTOMER NO.	SHIP. LOG NO.	INVOICE NUMBER
10/17/73	28300000	079162	7-40201-0

(SAME AS SOLD TO UNLESS NOTED)

SOLD TO: ENCORE TAPE & LABEL
516 HWY 35
NEPTUNE N J 07753

SHIP TO:

NO RETURNS ACCEPTED WITHOUT WRITTEN AUTHORIZATION

PLEASE MAIL REMITTANCE TO: P.O.BOX 5231,CHURCH ST.STATION NEW YORK, N.Y. 10249

B/O DATE	STATE CODE	BROKER CODE	SALES CODE	CUSTOMER ORDER NO.	SHIP VIA	TERMS	DATE ENTERED	DATE SHIPPED
10/17/73	29		902	10473		2/20 NET	10/12/73	10/11

ITEM 1

STYLE NO.	COLOR	SIZE WIDTH	SIZE LENGTH	DESCRIPTION	PACK	UNIT PRICE		QUANTITY B/O	QUANTITY SHIPPED	AMOUNT
120		3/4	60Y	MASKING	C	.260			2112	549.12
122		1"	60Y	MASKING	C	.240			744	178.56
125		2"	60Y	MASKING	C	.690			648	447.12
500		1/2	60Y	POLY FILM/ GLASS RE	B	.570		2160		
800		3/4	60Y	POLY FILM/ GLASS RE	B	.210			504	423.36
805		3/8	25921	CELLOPHANE	I	.210			144	30.24
805		1/2	12961	CELLOPHANE	I	.200			792	158.40
805		1/2	25921	CELLOPHANE	I	.260			144	37.44
805		3/4	12961	CELLOPHANE	I	.260			144	37.44

PLEASE CONFIRM OPENING TOP ORDER SHIP & B/O

SCHEDULE A-1

TO INSURE PROPER CREDIT, PLEASE SHOW INVOICE NUMBER ON REMITTANCE — TOTAL > 1,824.04

NOTE: All claims must be made within two days. Transportation carrier selected via lowest cost routing unless noted above. Length and width size tolerances guaranteed to average ordered specifications.

If this bill is incorrect return at once — deductions at time of remittance are not permitted. No claims for adjustment of the invoice are allowed after 15 days from mailing.

PLEASE PAY FROM INVOICE - STATEMENT WILL NOT BE ISSUED

NUMERICAL FILE COPY

EXHIBIT C2 - TUCK INVOICE DATED OCTOBER 17, 1973

505a

WE HAVE A SENSE OF VALUE.

TUCK INDUSTRIES, INC. LEFEVRE LANE, NEW ROCHELLE, NEW YORK 10801

D-U-N-S NO. 00-152-4818

(914) 235-1000

INVOICE DATE	CUSTOMER NO.	SHIP. LOG NO.	INVOICE NUMBER
10/26/73	28380000	075677	7-47201-1

SOLD TO: ENCORE TAPE & LABEL
210 HWY 35
NEPTUNE N J 07753

(SAME AS SOLD TO UNLESS NOTED)

SHIP TO:

NO RETURNS ACCEPTED WITHOUT WRITTEN AUTHORIZATION

PLEASE MAIL REMITTANCE TO: P.O.BOX 5251,CHURCH ST.STATION NEW YORK, N.Y. 10249

B/O DATE	STATE CODE	BROKER CODE	SALES CODE	CUSTOMER ORDER NO.	SHIP VIA	TERMS	DATE ENTERED	DATE SHIPPED
* 10/8/73	27		202	10473		2/20 NET	10/12/73	10/24

ITEM 11 12

STYLE NO.	COLOR	SIZE WIDTH	SIZE LENGTH	DESCRIPTION	PACK	UNIT PRICE		QUANTITY B/O	QUANTITY SHIPPED	AMOUNT
203		1/2	60Y	POLY FILM/ GLASS RE	R	.570			2143	1,221.20
206		1/2	25921	CELLOPHANE	R	.210			704	148.00
		CREDIT ON OPEN TOP ORDER SHIP & B/O								

TO INSURE PROPER CREDIT, PLEASE SHOW INVOICE NUMBER ON REMITTANCE

TOTAL ▶ 1,369.52

NOTE All claims must be made within five days. Transportation charges prepaid via lowest cost routing unless noted above. Length and width specifications guaranteed to average ordered specifications.

If this bill is incorrect return at once — deductions at time of remittance are not permitted. No claims for adjustment of the invoice are allowed after 15 days from mailing.

PLEASE PAY FROM INVOICE - STATEMENT WILL NOT BE ISSUED

NUMERICAL FILE COPY

EXHIBIT C3 - TUCK INVOICE DATED OCTOBER 26, 1973

506a

TUCK INDUSTRIES, INC. LEFEVRE LANE, NEW ROCHELLE, NEW YORK 10801

WE HAVE A SENSE OF VALUE.

D-U-N-S NO. 00-152-4818

(914) 235-1000

INVOICE DATE	CUSTOMER NO.	SHIP. LOG NO.	INVOICE NUMBER
10/26/73	28330000	050214	7-46316-0

SOLD TO
ENCORE TAPE & LABEL
516 HWY 33
NEPTUNE N J 07753

(SAME AS SOLD TO UNLESS NOTED)

SHIP TO

NO RETURNS ACCEPTED WITHOUT WRITTEN AUTHORIZATION

PLEASE MAIL REMITTANCE TO: P.O. BOX 5231, CHURCH ST. STATION NEW YORK, N.Y. 10249

B.O DATE	STATE CODE	BROKER CODE	SALES CODE	CUSTOMER ORDER NO.	SHIP VIA	TERMS	DATE ENTERED	DATE SHIPPED
10/26/73	29		001	10473		2/20 N30	10/12/73	10/17

STYLE NO.	COLOR	SIZE WIDTH	SIZE LENGTH	DESCRIPTION	PACK	UNIT PRICE		QUANTITY B/O	QUANTITY SHIPPED	AMOUNT
21		1/2	60Y	POLYESTER/POPE	8	.670			72	48.24
		OPENING TOP PART OF LAP ORD								

ITEM 10

TO INSURE PROPER CREDIT, PLEASE SHOW INVOICE NUMBER ON REMITTANCE

TOTAL ▶ 48.24

NOTE All claims must be made within five days of receipt. Transportation charges prepaid via lowest cost routing unless noted above. Length and width specifications guaranteed to average ordered specifications.

If this bill is incorrect return at once — deductions at time of remittance are not permitted. No claims for adjustment of the invoice are allowed after 15 days from mailing.

PLEASE PAY FROM INVOICE — STATEMENT WILL NOT BE ISSUED

NUMERICAL FILE COPY

EXHIBIT C4 - TUCK INVOICE DATED OCTOBER 26, 1973

507a

EXHIBIT C5 - STATEMENT DATED JULY 23, 1974 [illegible] 508a

WE HAVE A SENSE OF VALUE.

Tuck Industries, Inc., 1 LeFevre Lane, New Rochelle, New York 10801

STATEMENT

NAME: Encore Tape & Label
516 Highway #35
Neptune, New Jersey 07753

DATE July 23,1974

DATE	TRANSACTION NUMBER	DEBIT	CREDIT	BALANCE
10/17/73	7-49201-0	1824 06		
10/26/73	7-49201-1	1397 52		
10/26/74	7-49315-0	48 24		
				3269 82

EXH. C-5

EXHIBIT C6 - LETTER FROM GERALD A. FOX TO JOHN A. GAVIN DATED AUGUST 9, 1974 509a

GERALD A. FOX
Vice President, General Counsel and Secretary

Technical Tape Inc.

August 9, 1974

Mr. John A. Gavin
407 Beacon Blvd.
Sea Girt, New Jersey 08750

Dear John:

This is your confirmation of our telephone conversation today.

You have agreed to pay your $3,269.82 indebtedness to Tuck Industries as follows:

$500.00 on or before Sept. 1, 1974

$500.00 per month on or before the first day of each month from October 1, 1974 through February 1, 1975.

The balance of $269.82 will be paid on or before March 1, 1975.

Please send all of these checks directly to me.

Very truly yours,

TUCK INDUSTRIES, INC.

Gerald A. Fox

By Gerald A. Fox
Vice President,
General Counsel & Secretary

GAF/pr

EXH. C-6

EXHIBIT C7 - CHECK DATED SEPTEMBER 4, 1974 510a

MANASQUAN SAVINGS & LOAN ASSOCIATION W44364

September 4 19 74 55-244/212

PAY TO THE ORDER OF Tuck Industries, Inc. $ 500.00

-MANASQUAN- S. & L. ASS'N. 500 dol's 00 cts DOLLARS

First Merchants National Bank
MANASQUAN, NEW JERSEY 08736

Carol Roberts AUTH. SIG.

Robert J. Black AUTH. SIG.

⑆0212⑈0244⑆ 032 001 335⑈

EXH. C-7

SUR REPLY AFFIDAVIT OF AMOS ALTER FILED FEBRUARY 7, 1975 511a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN A. GAVIN, Plaintiff, - against - TECHNICAL TAPE, INC., et ano., Defendants.	Index No. 73 Civ.2120 (EW) SURREPLY AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

AMOS ALTER, being duly affirmed, deposes and says:

1. I am a member of the Bar of this Court, and am associated with Parker, Chapin and Flattau, attorneys for the plaintiff. I make this affidavit in further opposition to defendants' motion for a new trial and related relief.

2. It is not necessary for me to comment on the allegations of the reply affidavit of Mr. Gerald A. Fox, which attempt to inject new fact arguments not found in moving papers. Even if Mr. Fox had personal knowledge of the facts alleged, which he does not, their assertion for the first time, in reply papers served more than ten days after judgment has been entered, is untimely. Mr. Fox's computations are clearly irrelevant, as they are computed under plaintiff's second claim, whereas this Court gave judgment on the first claim.

3. While it is irrelevant to this case, I feel I must respond to the allegation by Mr. Fox that plaintiff withheld disclosure of the books and records of Encore Tape. As is shown by the annexed letter, plaintiff offered Mr. Fox inspection of

Encore's books and records in April, 1974. No interest was expressed in inspecting them until this Court placed the case on the Ready Calendar. They were then made available, and were inspected.

4. The new legal arguments attempted to be raised in defendants' reply papers should also not be considered by this Court. However, it is clear in any event that they are without merit. Particularly, the claim as to the date when interest should begin to run is specious. The entire sum became due and owing upon the date of the breach by defendants, by reason of the doctrine of anticipatory repudiation. Therefore, the interest should be computed from the date of the breach.

Amos Alter

Affirmed to before me this
31st day of January, 1975.

Jordan M. Newman

JORDAN M. NEWMAN
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-2856550
Qualified in Kings County
Commission Expires March 30, 1975

LETTER OF AMOS ALTER TO GERALD A. FOX DATED APRIL 15, 1974
ANNEXED TO FOREGOING SUR REPLY

COPY

15 April 1974

Gerald A. Fox, Esq.
Technical Tape, Inc.
One LeFevre Lane
New Rochelle, New York 10801

Re: Gavin v. Technical Tape

Dear Mr. Fox:

As you have heretofore been advised, the books of Encore Labelling are now available for inspection at the premises of Encore.

Please telephone the undersigned upon two (2) business days' notice to arrange for the examination.

Very truly yours,

Amos Alter

AA/kg

cc: Mr. John A. Gavin

ORDER OF EDWARD WEINFELD, U.S.D.J. DATED FEBRUARY 21, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

JOHN A. GAVIN,

Plaintiff,

-against-

TECHNICAL TAPE, INC. and TUCK INDUSTRIES, INC.,

Defendants.

- -x

Defendants having moved for an order amending the opinion, findings of fact and conclusions of law, and for a new trial; it is

ORDERED, that the opinion, findings of fact and conclusions of law, filed January 10, 1975, be, and it hereby is, amended as follows:

1. (a) On page 10, fifth line, the sentence beginning thereon ("As to. . ."), shall begin a new paragraph. Immediately prior thereto, the following new paragraph is inserted:

"On the issue of damages, the defendants wrongfully terminated the employment; however, they did not give him severance pay either at the salary to which he was entitled at the time of discharge, to wit, $50,000 per annum, or at the rate of $35,000 per annum, referred to in the severance pay provision which defendants now claim is a liquidated damage clause--- a defense never pleaded or raised at the trial.(1) The severance pay clause is not a liquidated damage provision. The damages are not difficult to determine. To apply it as a liquidated damage clause would be disproportionate to the damages suffered by plaintiff and unfairly deprive him of that to which he was entitled. (2) It is clear that the severance pay clause was geared to the salary to be paid to plaintiff, which at the time of the making of the contract was $35,000, but at the time of discharge by mutual consent had been raised to $50,000."

1. (b) p.10, 5th line, Paragraph ahead "As to".

2. On page 9, 12th line, the word "this" is stricken, and there is substituted in lieu thereof the words "any tendered resignation by the plaintiff".

"(1) See F.R.C.P. 8(c). Failure to plead an affirmative defense results in a waiver of the defense. Trio Process Corp. v. L. Goldstein's Sons, Inc., 461 F.2d 66, 74 (3d Cir. 1972), cert. denied, 409 U.S. 997 (1972); Radio Corp. of America v. Radio Station KYFM, Inc., 424 F.2d 14 (10th Cir. 1970).

"(2) See Walter E. Heller & Co. v. American Flyers Airline Corp., 459 F.2d 896 (2d Cir. 1972)."

3. On page 11, the sentence beginning on line 16 ("Plaintiff is therefore entitled. . .") is stricken, and there is substituted in lieu thereof the following new paragraph:

> "Plaintiff is therefore entitled to a recovery of $48,082.19, with interest figured on the basis of the several weekly salary payments he should have received to the expiration date of the contract, April 5, 1974. From that sum is to be subtracted his net earnings in mitigation, $8,227. The sum so computed is plaintiff's net recovery, upon which he is entitled to interest from April 5, 1974.";

and it is further

ORDERED, that the judgment herein, filed January 13, 1975, be and it hereby is modified by striking the words "$39,855.19., with interest from the date of discharge, April 6, 1973.", and substituting in lieu thereof the words "$41,218.46, with interest thereon from April 5, 1974."; and it is further

ORDERED, that defendants' motion be and it is hereby, in all other respects denied.

Dated: New York, New York
February 21, 1975

s/ Edward Weinfeld
Edward Weinfeld, U.S.D.J.

of April 4, 1972